(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Phelps Dodge Corporation Verde Valley Ranch Development	)	NPDES Appeal No. 01-07
NPDES Permit No. AZS000006	)	

[Decided May 21, 2002]

ORDER DENYING REVIEW AND REMANDING

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

PHELPS DODGE CORPORATION
VERDE VALLEY RANCH DEVELOPMENT

NPDES Appeal No. 01-07

ORDER DENYING REVIEW AND REMANDING

Decided May 21, 2002

Syllabus

On January 3, 2001, U.S. Environmental Protection Agency Region IX issued a National Pollutant Discharge Elimination System ("NPDES") permit decision to Phelps Dodge Corporation, pursuant to Clean Water Act ("CWA") § 402(p), 33 U.S.C. § 1342(p). The permit decision authorizes storm water discharges from the construction and operation of a new development project, called the "Verde Valley Ranch," that is proposed for a 977-acre site in Clarkdale, Arizona. The project is proposed to consist of 1,200 residential homes, commercial buildings, an eighteen-hole golf course, roads, parkland, and a wastewater treatment facility. The project also includes a waste remediation component: four million tons of copper mining tailings are situated on the Ranch site. The tailings contain high levels of sulfates, calcium, magnesium, and heavy metals such as cadmium, copper, lead, and zinc, and these pollutants have contaminated area soils and groundwater over the years.

On February 5, 2001, the Yavapai-Apache Nation ("Nation"), a downstream neighbor of the proposed project, filed a petition for review of the NPDES permit with the Environmental Appeals Board ("Board"), requesting on numerous grounds that the permit be remanded to EPA Region IX for further consideration. The Nation contended, among other things, that in issuing the permit, Region IX violated the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), the National Historic Preservation Act ("NHPA"), and federal reserved water rights principles.

The Board heard oral argument in this case on January 23, 2002. At that argument, the Nation contended that EPA made a reviewable policy choice when it decided to allow remediation of the mining tailings to proceed in accordance with the CWA rather than the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") or "Superfund" program. The Nation also informed the Board that in early January 2002, it had asked EPA to reinitiate formal consultation with the U.S. Fish & Wildlife Service ("FWS") pursuant to section 7 of the ESA to consider potential impacts on newly designated critical habitat for the spikedace, a threatened fish species.

Held: The Yavapai-Apache Nation's petition for review is denied on all grounds. However, the Board remands the NPDES permit for further proceedings consistent with the ESA and its implementing regulations. With respect to the petition for review, the Board finds as follows:

- NEPA Issues. EPA Region IX did not commit clear error by declining to conduct a NEPA analysis of the NPDES permit and associated impacts. The CWA exempts from NEPA compliance all NPDES-permitted sources except those considered to be statutory "new sources," and the Verde Valley Ranch does not qualify as a "new source" under the CWA at this time. In light of the explicit congressional exemption of non-new sources from NEPA review, the Board need not decide whether the entire Ranch project has been "federalized" as a result of the NPDES permit's issuance. Finally, under these circumstances, Region IX has no legal obligation to conduct an analysis of the project that is "functionally equivalent" to a NEPA analysis.

- ESA Issues. EPA Region IX did not commit clear error by relying on the FWS's biological opinions, which FWS issued in 1997 and 1999 to address potential project impacts on the southwestern willow flycatcher, bald eagle, peregrine falcon, Mexican spotted owl, razorback sucker, spikedace, Arizona cliffrose, Colorado squawfish, and Yuma clapper rail. The Yavapai-Apache Nation failed to identify, with sufficient specificity, any new information on potential impacts to endangered or threatened species or critical habitat that FWS did not consider in its analysis. Thus, the Board has no basis upon which to order a remand of the permit for reevaluation of these ESA issues by Region IX.

- NHPA Issues. The Yavapai-Apache Nation failed to show any clear error or other reason for the Board to grant review of the NPDES permit on this ground. In its petition for review, the Nation repeated its comments on the draft permit, in which it claimed to have been excluded from the NHPA § 106 consultation process regarding historic and cultural resources in the vicinity of the proposed project. EPA Region IX had responded to those comments by identifying ways in which the Nation had in fact been included in the process. The Nation's failure to do anything other than reiterate its earlier claims of exclusion, without any attempt to rebut the Region's information to the contrary, provides no basis for a grant of review by the Board.

- Federal Reserved Water Rights Issues. Under *Winters v. United States*, 207 U.S. 564 (1908), Congress' explicit establishment of a

reservation as the "permanent home and abiding place" of a Native American tribe also reserved, by implication, the water rights necessary to achieve the purposes for which the reservation was created. The Nation alleged that Region IX violated its reserved water rights, both in terms of water quantity and water quality, in issuing the NPDES permit. The Board finds that, as to water quantity, it lacks jurisdiction to resolve the dispute. As to water quality, the Board finds no basis to import a federal drinking water standard for arsenic, promulgated pursuant to the Safe Drinking Water Act, into this CWA NPDES proceeding. Moreover, the Board defers to Region IX's technical expertise regarding the efficacy of sand filters and other water quality protection measures, in the absence of any compelling evidence or argument identifying potential problems with those measures.

- Breach of Trust and Fiduciary Duties. These issues were not raised during the comment period and thus were not preserved for review by the Board.

- Environmental Justice. The Yavapai-Apache Nation alleged that EPA Region IX failed to analyze the purportedly disproportionately high and adverse human health and environmental effects the proposed project will have on the Nation, a minority and low-income population. In so doing, the Nation merely repeated its very general comments on the draft permit rather than attempting to rebut the Region's finding, expressed in its response to comments on the draft permit, that "the design of the project will ensure that there will be no excessive human health or environmental impacts to minority or low income communities." The Board finds the Nation's arguments to be insufficiently specific to warrant a grant of review of the NPDES permit.

With respect to the Yavapai-Apache Nation's "CWA versus CERCLA" policy argument, the Board holds that EPA had discretion to choose to proceed under one statute or the other. The Board finds that EPA, FWS, the U.S. Army Corps of Engineers, the State Historic Preservation Officer, and other governmental entities conducted a variety of detailed analyses of the proposed project's environmental impacts, and that, furthermore, the Yavapai-Apache Nation made no showing of clear error in EPA's preparation of or reliance on those analyses. Thus, the Board declines to exercise its discretion to grant review of the NPDES permit on the basis of the Nation's policy argument.

Finally, the Yavapai-Apache Nation brought to the Board's attention the fact that FWS designated critical habitat for the spikedace, a threatened fish species, after ESA section 7 consultation for the NPDES permit had concluded but before Region IX

issued the final permit decision to Phelps Dodge. Region IX subsequently admitted that the Verde Valley Ranch's NPDES permit "may affect" the critical habitat of the spikedace. Under the ESA and its implementing regulations, EPA and FWS have an affirmative obligation to reinitiate ESA section 7 consultation in these circumstances. Moreover, the NPDES permit cannot be reissued or become effective until the reinitiated ESA consultation process is completed and any necessary changes integrated into the permit in accordance with the NPDES permitting process. Thus, the permit is remanded to the Region for further proceedings consistent with the ESA and its implementing regulations.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

On January 3, 2001, Region IX of the U.S. Environmental Protection Agency ("EPA" or "Agency") issued a National Pollutant Discharge Elimination System ("NPDES") permit decision[1] to Phelps Dodge Corporation, pursuant to Clean Water Act section 402(p), 33 U.S.C. § 1342(p). The permit decision authorizes storm water discharges from the construction and operation of a new residential and commercial development project, called the "Verde Valley Ranch," that is proposed for a 977-acre site in Clarkdale, Arizona. On February 5, 2001, the Yavapai-Apache Nation ("Nation"), a downstream neighbor of the proposed project, filed a petition for review of the NPDES permit with the Environmental Appeals Board, requesting on numerous grounds that the permit decision be remanded to Region IX for further consideration. For the reasons set forth below, the petition for review is denied. The permit decision, however, is nonetheless remanded to EPA for further proceedings consistent with the Endangered Species Act and its implementing regulations.

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[1]Under the Clean Water Act ("CWA"), any person who discharges any pollutant through a point source (e.g., pipe, ditch, channel, conduit) to waters of the United States must obtain a permit authorizing the discharge. CWA §§ 301(a), 502, 33 U.S.C. §§ 1311(a), 1362. The NPDES program is one of the principal permitting programs established by the CWA. *See* CWA § 402, 33 U.S.C. § 1342 (NPDES program).

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

The Clean Water Act ("CWA" or "Act") authorizes EPA to regulate storm water[2] discharges into waters of the United States from a variety of sources, including construction sites. At present, EPA requires NPDES permits for discharges of storm water from construction sites where activities such as clearing, grading, and excavation result in the disturbance of five or more acres of total land area. CWA § 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B); 40 C.F.R. § 122.26(b)(14)(x). Smaller sites may also be regulated if they are part of a "larger common plan of development or sale" that disturbs a minimum of five acres. 40 C.F.R. § 122.26(b)(14)(x). In addition, sources that EPA identifies as "contribut[ing] to a violation of a state water quality standard" or as being "significant contributor[s] of pollutants to waters of the United States" must apply for a storm water permit, regardless of how many acres of land they affect. CWA § 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E).

In the State of Arizona, EPA Region IX is responsible for issuing all NPDES permits. Most storm water discharges from large-scale construction activities in the State are authorized under the federal general storm water permit (the "construction general permit" or "CGP"). *See* 63 Fed. Reg. 7858, 7901-8014 (Feb. 17, 1998) (terms of CGP and addenda; permits applicable to non-"Indian Country" lands in Arizona are denoted "AZR10*###"). However, a number of limitations on the coverage of the CGP exist. *See id*. at 7903 (listing limitations). For example, if construction-related storm water discharges may adversely affect endangered or threatened species or critical habitat designated under the Endangered Species Act, 16 U.S.C. §§ 1531-1544, those discharges are not eligible for coverage under the CGP and must instead be permitted via an individual, site-specific NPDES permit. 63 Fed. Reg.

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[2]The term "storm water" is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13).

at 7903. Moreover, the CGP does not authorize post-construction discharges of storm water; depending on the circumstances of the discharge and the receiving waters, such discharges may not require any NPDES permit at all or they may require an individual permit. *Id*.; *see* CWA § 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E) (if EPA determines a post-construction storm water discharge will constitute a "significant contributor of pollutants to waters of the United States," EPA may require an NPDES permit for that discharge).

NPDES storm water permits for construction sites generally contain requirements to prepare and implement a storm water pollution prevention plan ("SWPPP"), conduct self-monitoring and inspection activities on storm water controls, report accidental releases of hazardous substances or oil, control nonstorm water discharges, and so on. *See*, *e.g.*, 63 Fed. Reg. at 7905-12 (construction general permit). The SWPPP, which typically includes descriptions of the site, the pollution controls that will be installed at the site, maintenance and inspection procedures, and measures to prevent nonstorm water discharges, is an important component of the permit. *See id*. at 7906-09. Under the CGP, for example, permittees must design and implement four classes of pollution controls and set them forth in their SWPPPs: (1) erosion and sediment controls, such as seeding, mulching, silt fences, earth dikes, drainage swales, and sediment traps; (2) storm water management controls, such as sand filter systems, storm water detention basins, velocity dissipation devices, and manmade wetlands; (3) other specified controls, such as dust suppression and control of off-site tracking of sediment by vehicles; and (4) any applicable controls specified in state, tribal, or local sediment, erosion, or storm water management programs. *Id*. at 7907-09. Similar requirements are typically imposed in individual and state general storm water permits.

In issuing NPDES permits for storm water discharges under section 402 of the Clean Water Act, EPA may in particular circumstances be required to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370e, the Endangered Species Act, 16 U.S.C. §§ 1531-1544, the National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6,

and several other potentially applicable federal statutes. *See* 40 C.F.R. § 122.49.

B. *Factual Background*

Phelps Dodge owns a 977-acre parcel of land in Clarkdale, Yavapai County, Arizona, in an area unusually rich in ecological and cultural resources. The parcel is bounded to the south and west by the Verde River, a perennial watercourse supported by natural springs, seeps, and surface runoff. In past geologic time, the Verde River formed a large "u"-shaped meander channel, or "oxbow," in the center of what is now Phelps Dodge's land. The oxbow flow ended at some later geologic time when the River carved its way through rock that had been obstructing its downhill flow. Many thousands of years later, in 1920, Phelps Dodge diverted Verde River water into the old oxbow channel to form a hundred-acre lake -- called Peck's Lake -- on its property. Next to the Lake in the southeast arm of the old oxbow channel lies the Tavasci Marsh, a thirty-acre wetland fed largely by natural springs and also by the Lake. The Lake, River, and Marsh provide habitat for a number of federally endangered, threatened, or candidate species of fish, wildlife, and plants, including the southwestern willow flycatcher, bald eagle, peregrine falcon, Mexican spotted owl, Yuma clapper rail, razorback sucker, spikedace, Arizona cliffrose, Colorado squawfish, and loach minnow. To date, the area has been designated as critical habitat for the spikedace, loach minnow, and razorback sucker and as proposed critical habitat for the southwestern willow flycatcher.[3] Finally, immediately to the southeast of Phelps Dodge's parcel is Tuzigoot National Monument, the site of prehistoric Indian ruins. Other prehistoric or historic Native American sites on or near the property include the Hatalacva Ruins and

[3]*See* 65 Fed. Reg. 24,328 (Apr. 25, 2000) (spikedace and loach minnow), *appeal docketed*, *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, Civ. No. 02-199 (D.N.M. Feb. 20, 2002); 62 Fed. Reg. 39,129 (July 22, 1997) (southwestern willow flycatcher), *set aside*, *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001) (ordering U.S. Fish & Wildlife Service ("FWS") to issue new flycatcher critical habitat determination taking into account certain economic impacts); 59 Fed. Reg. 13,374 (Mar. 21, 1994) (razorback sucker).

grave sites of the Yavapai-Apache Nation, which holds these sites to be sacred.

From 1927 through 1953, Phelps Dodge used the southwestern portion of the old oxbow channel as a disposal site for approximately four million tons of copper mining tailings. The copper tailings, variously referred to as the "tailings pile," "tailings impoundment," or "tailings pond," cover approximately 129 acres of the oxbow channel.[4] In the 1970s, the Town of Clarkdale entered into an agreement with Phelps Dodge to use the tailings pile as a discharge point for treated effluent from the Town's wastewater plant. In the early 1980s, Clarkdale

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[4]A 1993 report on the mining tailings and their history explains:

> [Phelps Dodge's] United Verde copper mine, located in Jerome, [Arizona,] began commercial operations in 1883 with the mining of surface oxide ores. When these were exhausted in 1893, mining and smelting of other subsurface massive sulfide ore bodies began. A concentrator was constructed in Clarkdale in 1927, prior to which ore was smelted without concentrating. Concentration consists of crushing the ore in mills, then separating the economic, or metal-bearing, fraction from the host rock by a wet chemical process called flotation. The metal-bearing, or sulfide-rich, fraction was smelted, and the uneconomic fraction, or "tails," was transported as a slurry via a wooden pipeline to the present location of the tailings pond. The mill tailings were contained by a dam, apparently constructed of tailings, at the northwest end of the pond area. Operation of the concentrator ceased in 1952, and the discharge of tailings pond ceased permanently in 1953. Over the years, the slurry water evaporated and drained, resulting in the present dry tailings pond.
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> The tailings pond covers [more than 100] acres and contains approximately 3.8 million cubic yards, or 4 million tons of material. The tailings consist entirely of inorganic silts and very fine grained sands. Two borings from the tailings indicate that the depth of tailings in the pond ranges from 48 feet at the northwest end to 13 feet at the southeast end. The tailings pond is located within approximately 750 feet of the Verde River.

Ecology & Env't, Inc., *Screening Site Inspection Summary Report for Phelps Dodge Verde Mine* 2-1 (Feb. 18, 1993) (Administrative Record Index No. XIII(10)).

began discharging wastewater onto the tailings pile at a rate of 100,000 gallons per day maximum. *See Save Our Lovely Valley Env't ("SOLVE") v. Phelps Dodge Corp.*, Dkt. No. 95A-001 ADM/WQM, slip op. at 4-5 (Ariz. Water Quality Appeals Bd. Apr. 15, 1996) (Administrative Record ("AR") Index No. XVI(4)), *aff'd sub nom. SOLVE v. Ariz. Dep't of Envtl. Quality*, Dkt. No. CV-96-20393 (Maricopa County Super. Ct. filed Mar. 4, 1998).

The tailings contain high levels of sulfates, calcium, magnesium, and heavy metals such as cadmium, copper, lead, and zinc. These pollutants migrated over the years from the tailings pile into a shallow alluvial aquifer that is situated beneath the tailings pile and the oxbow channel. As the Town of Clarkdale discharged municipal wastewater onto the top of the tailings, the volume of water percolating through the pile into the alluvial aquifer increased and, as a consequence, the aquifer would periodically overflow (or "seep") over a subterranean ridge of "Verde Formation" stone into the Verde River. This phenomenon became visible when calcium, sulfate, and metals deposits began to form along the margins of the tailings pile on the land surface between the pile and the Verde River. *SOLVE v. Phelps Dodge Corp.*, slip op. at 5.

In 1990, EPA issued CWA section 309 administrative enforcement orders to the Town of Clarkdale and Phelps Dodge directing that municipal wastewater discharges to the tailings pile cease and that seepage from the tailings pile be controlled. EPA engaged a consultant to conduct a preliminary investigation of the site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, and, in 1993, the consultant produced a report evaluating the potential human health and environmental risks posed by the site. *See* Ecology & Env't, Inc., *Screening Site Inspection Summary Report for Phelps Dodge Verde Mine* (Feb. 18, 1993) (AR XIII(10)). EPA followed up with an expanded site investigation to gather additional data on the site, and the results of this investigation were summarized in a March 25, 1994 report. *See* EPA Region IX, *Response to Public Comments: NPDES Permit for Storm Water Discharges from Phelps Dodge Corp., Verde Valley Ranch Development, NPDES Permit No. AZS000006* ¶ 16.2, at 22 (Dec. 20,

2000) ("RTC") (discussing expanded site investigation). On the basis of these reports, EPA did not subsequently list or propose to list the site on the "National Priorities List," which is a compilation of contaminated sites ranked by priority order for remediation, *see* CERCLA § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B), nor did the Agency take further action pursuant to CERCLA. Instead, EPA elected to pursue cleanup of the site under the auspices of the CWA (as described further below). *See* RTC ¶ 16.3, at 22 ("[a]fter review of the results of the site investigations, * * * EPA's Superfund program concluded that suitable tools were available under the [CWA] to ensure appropriate remediation of the site"); Yavapai-Apache Nation's Petition for Review app. D (Letter from Alexis Strauss, Water Division, EPA Region IX, to Joe P. Sparks 1 (May 28, 1997)) ("[w]ith the project falling under several EPA mandates, it was concluded that the best approach would be to handle all activities under the authority of the [CWA]").

At the time it received EPA's administrative order, Phelps Dodge had already formulated a plan to develop the Clarkdale parcel as the "Verde Valley Ranch," a master planned community consisting of 1,200 residential homes, commercial buildings, an eighteen-hole golf course, roads, parkland, a wastewater treatment facility, and a mining tailings remediation project. Phelps Dodge began working with the Town of Clarkdale to bring this plan to fruition. Together, Phelps Dodge and the Town obtained two state Aquifer Protection Permits ("APPs") from the Arizona Department of Environmental Quality ("ADEQ"): one for the new municipal wastewater treatment facility, to be used by the Town and Verde Valley Ranch, and another for the remediation of the mining tailings.[5] *See* ADEQ, Aquifer Protection Permit No. P-100715 (issued Sept. 25, 1995) (AR XVI(1)) (wastewater treatment facility); ADEQ, Aquifer Protection Permit No. P-101076 (issued Sept. 25, 1995) (tailings impoundment).

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[5]Phelps Dodge and/or the Town of Clarkdale also apparently obtained another permit from ADEQ (which may or may not be an APP) authorizing reuse of treated wastewater from the wastewater treatment facility for on-site irrigation. *See*, *e.g.*, Yavapai-Apache Nation's Petition for Review app. D at 1.

The tailings impoundment APP authorizes Phelps Dodge and the Town of Clarkdale to, among other things: (1) cap the tailings with a thirty-mil high density polyethylene liner and three feet of soil, upon which a leachate collection system, landscaping, and part of the proposed golf course will be placed; (2) construct a soil-bentonite slurry wall between Peck's Lake and the tailings impoundment; and (3) install a groundwater pumpback system in the alluvial aquifer to lower the water level in the aquifer beneath the ridge of Verde Formation stone. *See*, *e.g.*, ADEQ, Responsiveness Summary for APP Nos. P-101076 & P-100715, at 15-30 (Nov. 1, 1994) ("APP Resp. Sum."); *SOLVE v. Phelps Dodge Corp.*, slip op. at 15-16, 25; Respondent's Excerpts of Record ("Resp. Ex.") 22 at 31-32, 43 (Letter from Sam F. Spiller, Field Supervisor, FWS, to Alexis Strauss, Acting Director, Water Division, EPA Region IX, at 31-32, 43 (Oct. 7, 1997)).[6] Storm water flows from high ground around the tailings pile will be diverted away from the pile by berms and graded surfaces, while direct precipitation onto the tailings pile itself will be captured by the leachate collection system and berms and pumped to an effluent storage pond. Together, these measures are intended to prevent the infiltration of water from various sources (groundwater, surface runoff) into the alluvial aquifer and subsequent discharges (i.e., overflows or seeps) of contaminated water from there into the Verde River. They are also designed to capture a 100-year, twenty-four-hour storm event (plus a large margin for error) and prevent storm water from such an event from running off the tailings cap into waters of the United States. *See* APP Resp. Sum. at 17, 22; *SOLVE v. Phelps Dodge Corp.*, slip op. at 12-23. The APP also requires Phelps Dodge to monitor water levels and pollutant concentrations in the Lake, Marsh, and River to assess and demonstrate the effectiveness of these storm water pollution controls. *See* APP Resp. Sum. at 27-28; *SOLVE v. Phelps Dodge Corp.*, slip op. at 16-18.

During the time the state APP permits were pending, Phelps Dodge was also engaged in the process of obtaining three federal

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[6]These cites to sources other than the tailings impoundment APP itself are necessary because the APP is not included in the administrative record for this storm water permit.

nationwide wetlands permits (a type of general permit) for the project from the U.S. Army Corps of Engineers ("Corps" or "ACOE"). *See* CWA § 404, 33 U.S.C. § 1344; 33 C.F.R. pts. 320, 323, 325 (Corps wetlands regulations); *see also* 40 C.F.R. pts. 230-233 (EPA wetlands regulations). The wetlands permits authorize discharges of dredged or fill material into waters of the United States for the purposes of: (1) constructing a utility crossing under the Verde River; (2) replacing the Peck's Lake outlet structure with a paved road crossing and concrete storm control structure and spillway; and (3) installing a road crossing in a dry wash leading into Peck's Lake. Resp. Ex. 12 app. B (Letter from Sam F. Spiller, State Supervisor, FWS, to John A. Gill, ACOE 2-3 (Nov. 9, 1994)). The Corps issued these permits to Phelps Dodge after engaging in consultations with the U.S. Fish & Wildlife Service and Arizona's State Historic Preservation Officer regarding potential project impacts on endangered species and historic resources. *See generally id*.; Resp. Ex. 12 app. B (Letter from Nancy M. Kaufman, Regional Director, FWS, to John A. Gill, ACOE (Feb. 27, 1996)); Resp. Exs. 6-10.

On January 2, 1996, Phelps Dodge submitted an application to EPA Region IX for an individual NPDES storm water permit to authorize surface runoff discharges of pollutants to waters of the United States from the Verde Valley Ranch. Region IX had previously informed Phelps Dodge that an individual rather than a general NPDES permit would be necessary because of the proposed project's potential effects on endangered species. *See* Resp. Ex. 15 at 2 (Letter from Alexis Strauss, Acting Director, Water Management Division, EPA Region IX, to Leo M. Pruett, Assistant General Counsel, Phelps Dodge Corp. 2 (Apr. 28, 1995)). EPA requested that Phelps Dodge prepare an SWPPP for the project that would include best management practices ("BMPs") and other measures to control pollutants in storm water discharges during and after construction. *Id*.; *see* 40 C.F.R. § 122.44(k) (BMPs included as NPDES permit conditions). The Region accepted public comments on the draft NPDES permit from October 10 through December 3, 1997, and held a public hearing on the permit on November 12, 1997. *See* Resp. Exs. 1-3; *see generally* RTC. The Region accepted further public comments in July-August 1998 after deciding to designate the site, pursuant to CWA section 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E), as

one requiring an ongoing NPDES permit for post-construction storm water discharges. *See* RTC ¶ 26, at 31-34. The Region stated:

> [D]ue to site-specific factors, specifically, the sensitive nature and ecological importance of the receiving waters of Peck's Lake, Tavasci Marsh and the Verde River, including the presence of federally listed endangered and threatened species affected by the post-construction storm water discharges, EPA has determined that the post-construction storm water discharge from the Verde Valley Ranch Development will significantly impact the receiving waters mentioned above and therefore constitutes a significant contributor of pollutants to waters of the United States.

Resp. Ex. 5 (EPA Region IX, *Notice of Determination and Designation Under Section 402(p)(2)(E) of the Clean Water Act* 1 (July 15, 1998)); *see* RTC ¶ 26.1, at 31.

On December 29, 2000, Region IX signed a final version of the NPDES permit decision and transmitted it to Phelps Dodge and other interested persons on January 3, 2001. *See* Petition app. ("Pet'r Ex.") A (EPA Region IX, NPDES Permit No. AZS000006 (signed Dec. 29, 2000)) ("Permit"). The permit authorizes discharges from the construction and post-construction phases of the Verde Valley Ranch project into Peck's Lake, Tavasci Marsh, and the Verde River. Peck's Lake will receive the majority of storm water runoff (218 acre-feet in a year of average rainfall), followed by Tavasci Marsh (24 acre-feet) and the Verde River (7.4 acre-feet). Pet'r Ex. F at 2-3 (Letter from David L. Harlow, Field Supervisor, FWS, to Alexis Strauss, Director, Water Division, EPA Region IX, at 2-3 (Sept. 10, 1999)). The NPDES permit prohibits these storm water discharges from causing or contributing to any violations of Arizona water quality standards in the Lake, Marsh, or River. Permit cond. I.A.4; *see* Ariz. Admin. Code tit. 18, ch. 11, at 53 (2001) (Arizona water quality standards applicable in instant case are those for Verde River above Bartlett Dam and for Peck's Lake).

The permit also incorporates an SWPPP that includes a wide variety of erosion and sediment controls and other BMPs to minimize or eliminate the adverse effects of uncontrolled storm water discharges. *See* Permit conds. I.A.2, I.F.16 & app. 1. During construction of the proposed project, for example, Phelps Dodge is required to stabilize disturbed soil areas by applying mulch, bonding agents, wood fiber, straw, and/or grass seed. URS Corp., *Stormwater Pollution Prevention Plan for Verde Valley Ranch, Clarkdale, Arizona* 3-6 to -7, 4-6 to -7 (Nov. 2000). The company must also install structural control measures that prevent erosion and capture sediment, such as drainage swales, check dams, earth dikes, silt fences, and sediment traps or basins. *Id*. at 3-7 to -8, 4-7 to -8. For post-construction storm water control, Phelps Dodge must install vegetated on-lot retention basins on lots larger than 8,000 square feet, in which storm water will be left to evaporate and/or infiltrate into the ground, whereas storm water from streets and smaller lots must be collected and routed to a sand filtration system for treatment prior to discharge to Peck's Lake. The proposed sand filter system will have a two-year, twenty-four-hour storm capacity; any volumes in excess of this amount will bypass the filters and flow directly into the Lake without treatment. *Id*. at 3-8, 4-8, 5-1 to -2. Other post-construction BMPs include oil/water separators in storm drains for large commercial parking lots, *id*. at 5-5, as well as measures to encourage good stewardship practices by Verde Valley Ranch residents and businesses (e.g., eliminate or minimize fertilizer/pesticide use; curtail lawn watering and vehicle washing; forbear from dumping oil/antifreeze/other pollutants into storm drains; etc.). *Id*. at 5-1 to -7. The SWPPP also contains an array of storm water management mechanisms for the proposed golf course. *See id*. at 5-8 to -20. Under the SWPPP, Phelps Dodge must inspect and maintain all the storm water controls on a regular basis. *Id*. at 3-16 to -21, 4-16 to -20, 5-17. Phelps Dodge also must sample and analyze, on an ongoing basis, the contents of the storm water entering and exiting the sand filter systems, Peck's Lake water, and Lake/Marsh/River sediment, and must report its monitoring findings to EPA and ADEQ on an annual basis. *See id*. § 6 & app. C (monitoring plan and standard operating procedures).

C. *Procedural Background*

On February 5, 2001, the Yavapai-Apache Nation filed with the Environmental Appeals Board a petition for review of Phelps Dodge's NPDES storm water permit for the Verde Valley Ranch. *See* Yavapai-Apache Nation's Petition for Review ("Pet'n"). The Nation argued on numerous grounds that the permit should be remanded to EPA Region IX, the permit issuer, for reevaluation, and also asked the Board to entertain oral argument in this case. The Board requested a response to the petition from EPA Region IX, the permit issuer, which the Region filed on April 25, 2001. *See* EPA Region IX's Response to Petition for Review ("R9 Resp."). Phelps Dodge had previously filed a motion for leave to intervene in these proceedings and, with the Board's permission, filed its own response to the petition for review on April 25, 2001. *See* Permittee/Intervenor Phelps Dodge Corporation's Response to Petition for Review ("PD Resp."). On June 8, 2001, the Nation filed a reply to the Region's and Phelps Dodge's responses. *See* Yavapai-Apache Nation's Reply to Responses to Petition for Review ("Reply Br.").

The Board heard oral argument in this case on January 23, 2002, in Washington, D.C. *See* Oral Argument Transcript ("Tr."). As a result of questions raised during the oral argument, the Board subsequently directed the parties and intervenor to file supplemental briefs addressing the interplay between CWA sections 301 and 402 in the context of storm water permitting. *See* Order Directing Supplemental Briefing (Jan. 24, 2002). The parties and intervenor filed these briefs with the Board on February 13, 2002. *See* Yavapai-Apache Nation's Supplemental Brief ("Pet'r Supp. Br."); EPA Region IX's Response to Order for Supplemental Briefing ("R9 Supp. Br."); Phelps Dodge Corp.'s Supplemental Briefing ("PD Supp. Br.").

In addition, the Board received a Notice of Filing Supplemental Authorities from the Yavapai-Apache Nation informing the Board that the Nation had sent a letter to Region IX on January 3, 2002, requesting that the Region reinitiate formal consultation with the U.S. Fish & Wildlife Service pursuant to the Endangered Species Act ("ESA") and its implementing regulations. The Nation sought reinitiation of consultation

between EPA and FWS to consider the federal action's effects on the critical habitat of the spikedace (a threatened fish species) that FWS had officially designated after ESA consultation on this NPDES permit had concluded. *See* Yavapai-Apache Nation's Notice of Filing Supplemental Authorities 3 & Ex. A (Jan. 17, 2002); Tr. at 90. The Board directed the parties and intervenor to report, by March 22, 2002, on the status of the Nation's reinitiation request and to provide their views on the implications of that request for the Board's pending decision in this appeal. *See* Order Directing Status Report (Mar. 8, 2002). After requesting and receiving an extension of time, the parties and intervenor filed their status reports with the Board on April 19, 2002. *See* EPA Region IX's Response to Order Directing Status Report ("R9 Status Rep."); Yavapai-Apache Nation's Status Report and Supplemental Brief ("Pet'r Status Rep."); Phelps Dodge Corporation's Status Report in Response to the Board's March 8, 2002 Order ("PD Status Rep."). Finally, on May 7, 2002, Phelps Dodge filed, with Board permission, a response to Region IX's and the Nation's status reports. *See* Phelps Dodge Corp.'s Response to Status Reports Filed by EPA Region IX and the Yavapai Apache Nation.

II. *DISCUSSION*

Under the rules governing this proceeding, an NPDES permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a); 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, NPDES Appeal Nos. 00-14 & 01-09, slip op. at 25-28, 31-33, 46 (EAB Feb. 20, 2002), 10 E.A.D. ___ (remanding portions of NPDES permit pursuant to section 124.19(a)). The Board's analysis of NPDES permits is guided by the preamble to the part 124 permitting regulations, which states that the Board's power of review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the [r]egional level." 45 Fed. Reg. at 33,412; *accord In re City of Moscow*, NPDES Appeal No. 00-10, slip op. at 9 (EAB July 27, 2001), 10 E.A.D. ___. The burden of demonstrating that review is warranted rests with the petitioner, who

must state his/her objections to the permit and explain why the permit issuer's previous response to those objections is clearly erroneous, an abuse of discretion, or otherwise warrants review. *City of Moscow*, slip op. at 9-10, 10 E.A.D. ___; *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71 (EAB 1998).

In this case, we are presented with, among many other things, an interesting policy-based argument from petitioner Yavapai-Apache Nation. The Nation argues that EPA made a policy choice, at some point after issuing the CWA section 309 enforcement orders in 1990, to allow remediation of this copper mining tailings site to proceed pursuant to the CWA as the Verde Valley Ranch project rather than via a CERCLA remediation or removal action. Tr. at 5-13; *see* Pet'n at 9, 18. According to the Nation, the Phelps Dodge parcel is a "hazardous waste site with four million tons of copper waste" sitting in hydrological contact with the Verde River in an ecologically fragile, biologically and historically unique "island" surrounded by Arizona desert, Tr. at 6-7, and EPA's and Phelps Dodge's attempts to recharacterize the toxic waste site as a "subdivision" are improper and misleading. Tr. at 8, 11-13, 17, 20-21. The Nation argues that under CERCLA, the parties would have been required to prepare an environmental impact statement, pursuant to the National Environmental Policy Act ("NEPA"), that would have taken a comprehensive, rigorous look at the direct, indirect, and cumulative impacts on the environment of the mining tailings and any proposed plan to remediate and/or remove same. Tr. at 6-10. Instead, what has happened, the Nation contends, is that EPA decided to proceed pursuant to the CWA rather than CERCLA, and as a result the federal agencies involved in this matter have issued permits on a piecemeal basis, looking only at the impacts of the narrow, permit-specific portion of the project (for example, at storm water impacts only for the NPDES permit) and not at the myriad impacts -- including cumulative impacts -- of the entire, complex, thousand-acre project on the surrounding environment as a whole. *Id*. The Nation believes this EPA policy choice violates the spirit of NEPA and the Agency's responsibility to protect the public from environmental harm. Tr. at 13, 16-18. The Nation therefore urges the Board to grant review of the NPDES permit.

In terms of the particulars of its petition to this Board, the Yavapai-Apache Nation argues that Region IX erred in issuing the final NPDES permit to Phelps Dodge because, in so doing, the Region: (1) failed to comply with NEPA and its implementing regulations or, in the alternative, failed to adequately assess the environmental impacts of the entire Verde Valley Ranch development project; (2) failed to comply with the ESA and its implementing regulations; (3) failed to comply with the National Historic Preservation Act and its implementing regulations; (4) failed to consider the impacts of the Verde Valley Ranch project on the Nation's federal reserved water rights; (5) breached its fiduciary duty and trust obligations to the Nation; and (6) failed to comply with the federal environmental justice policy. Each of these arguments is addressed in turn below. *See infra* Parts II.A-.E. Following the discussion of these issues, we examine the Nation's "CERCLA-versus-CWA" policy argument. *See infra* Part II.F. We conclude by discussing the question whether Region IX has an obligation to reinitiate Endangered Species Act consultation to evaluate the NPDES permit's potential effects on the spikedace's critical habitat. *See infra* Part II.G.

A. *National Environmental Policy Act*

The Yavapai-Apache Nation's primary argument in this appeal pertains to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370e, which requires federal agencies to consider, "to the fullest extent possible," the environmental impacts of their activities. *See id*. § 102, 42 U.S.C. § 4332. At the time of its enactment in 1969, NEPA was revolutionary; it embedded in federal decisionmaking a new sensitivity to environmental concerns that had not previously existed in any systematic or formal way. The heart of NEPA is the environmental impact statement ("EIS") requirement, which mandates the compilation of detailed information on:

> (1) the environmental impact of the proposed federal action;
> (2) any adverse environmental effects [that] cannot be avoided should the proposal be implemented;
> (3) alternatives to the proposed action;

> (4) the relationship between local short-term uses of [the human] environment and the maintenance and enhancement of long-term productivity; and
> (5) any irreversible and irretrievable commitments of resources [that] would be involved in the proposed action should it be implemented.

Id. § 102(2)(C)(i)-(v), 42 U.S.C. § 4332(2)(C)(i)-(v); *see* 40 C.F.R. pts. 1502, 1508 (NEPA EIS regulations and definitions promulgated by the Council on Environmental Quality ("CEQ"),[7] which apply to all federal agencies); 40 C.F.R. pt. 6 (EPA-specific NEPA regulations).

Under NEPA, a federal agency must prepare an EIS for any proposed action that is considered a "major federal action significantly affecting the quality of the human environment." NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C). A "major federal action" is an action "with effects that may be major and [that] are potentially subject to [f]ederal control and responsibility." 40 C.F.R. § 1508.18. "Effects" include all impacts caused either directly or indirectly by the proposed action. *Id*. § 1508.8. The term "significantly" is defined in terms of "context" and "intensity" and requires an evaluation of the proposed action's local/regional/ national setting and the severity of its individual and cumulative impacts (both beneficial and adverse). *See id*. § 1508.27.

NEPA is implicated in a panoply of federal activities, including policy and rulemaking, permitting, licensing, financing, and so on. *See*, *e.g.*, *In re Dos Republicas Res. Co.*, 6 E.A.D. 643, 662-66 (EAB 1996) (upholding EIS prepared by Region VI in course of issuing NPDES permit for new surface coal mine). Given the intent of Congress at the

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[7]In enacting NEPA, Congress created the CEQ in the Executive Office of the President. The CEQ is a three-member body composed of persons appointed by the President, with the advice and consent of the Senate, who, among other things, are "exceptionally well qualified to analyze and interpret environmental trends and information of all kinds * * * and to formulate and recommend national policies to promote the improvement of the quality of the environment." NEPA § 202, 42 U.S.C. § 4342.

time of NEPA's enactment to incorporate environmental concerns into routine federal decisionmaking, it is perhaps not surprising that NEPA itself does not exempt any specific federal activities from its purview. Over the years, however, Congress and the courts have created a significant number of exemptions to the far-reaching terms of the statute. One type of exemption is an express statutory exemption that appears in several environmental laws. *See*, *e.g.*, CWA § 511(c)(1), 33 U.S.C. § 1371(c)(1) (no EPA action taken pursuant to CWA is subject to NEPA-EIS requirements except issuance of NPDES permit to "new source" and federal funding of publicly owned treatment works ("POTW") construction); Energy Supply & Environmental Coordination Act § 7(c)(1), 15 U.S.C. § 793(c)(1) (no action taken under Clean Air Act is subject to NEPA-EIS requirements). Another type of exemption has arisen from judicial decisions that find agency compliance with other statutes to be "functionally equivalent" to NEPA evaluation and public participation procedures. *See*, *e.g.*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 384-86 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). Still other exemptions include statutory conflict exemptions, implied statutory exemptions, emergency circumstances exemptions, and categorical exclusions.[8]

In this case, the Yavapai-Apache Nation contends that Region IX committed clear error by failing to engage in a NEPA analysis for the Verde Valley Ranch project. The Nation argues this point on three alternate fronts. First, in its briefs before this Board, the Nation

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[8] *See*, *e.g.*, *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788-92 (1976) (NEPA must yield when clear and unavoidable conflict in statutory authority exists); *Tex. Comm. on Natural Res. v. Bergland*, 573 F.2d 201, 206-08 (5th Cir. 1978) (congressional intent in enacting National Forest Management Act implies that forest clearcutting is not subject to indirect review via NEPA process), *cert. denied*, 439 U.S. 966 (1978); *Nat'l Audubon Soc'y v. Hester*, 801 F.2d 405, 406-09 (D.C. Cir. 1986) (FWS decision to trap remaining wild California condors without full EIS documentation is warranted due to emergency); 40 C.F.R. § 1506.11 (rules for emergencies); 40 C.F.R. §§ 1501.4(a)(2), 1508.4 (federal agency may excuse from EIS requirement an action that falls into a general category of actions found by the agency not to have individual or cumulatively significant environmental impact); 40 C.F.R. § 6.107 (EPA's categorical exclusion rules).

acknowledges that the CWA contains an explicit exemption from NEPA compliance for all NPDES-permitted sources except those considered to be "new sources." Pet'n at 9-10; Reply Br. at 2-5; *see also* Tr. at 12, 17. According to the Nation, however, Verde Valley Ranch qualifies as a "new source" under the CWA, and thus Region IX had a clear legal obligation to engage in NEPA review for the project. Reply Br. at 2-5; *see* Tr. at 12, 18. Second, the Nation argues that even if Verde Valley Ranch does not qualify as a "new source," the project nonetheless has been "federalized" by the issuance of the NPDES permit. In the Nation's view, Phelps Dodge cannot proceed with any portion of the Verde Valley Ranch project unless it obtains an NPDES permit for storm water discharges therefrom, and as a result the entire project (rather than just the storm water component of the project) is a federal action warranting preparation of an EIS. Pet'n at 10-11; Reply Br. at 5-6; Tr. at 19, 82-83. Third, the Nation contends that even if a NEPA analysis is not legally required for this project, Region IX must conduct a functionally equivalent environmental analysis. Pet'n at 12-17; Reply Br. at 6-8; *see* Tr. at 20, 85. We address each of these arguments in turn below.

1. *New Source*

As mentioned above, the CWA is one of several federal statutes that explicitly exempt from NEPA-EIS requirements certain actions authorized under their terms. The Act provides:

> Except for the provision of [f]ederal financial assistance for the purpose of assisting the construction of [POTWs] as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title [(i.e., NPDES permits)] for the discharge of any pollutant by a *new source* as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major [f]ederal action significantly affecting the quality of the human

> environment within the meaning of the National Environmental Policy Act of 1969 * * *.[9]

CWA § 511(c)(1), 33 U.S.C. § 1371(c)(1) (emphasis added). In the process of enacting these exemptions, the Senate and House Conference Committee observed, "If the actions of the Administrator under [the CWA] were subject to the requirements of NEPA, administration of the Act would be greatly impeded." S. Conf. Rep. No. 92-1236, at 149 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3827. Despite their concerns in this vein, the Committee members nonetheless deemed it "sound public policy" to require EPA's compliance with NEPA in the two CWA contexts mentioned above: (1) construction grants for POTWs, and (2) NPDES new source permitting. With respect to new source permitting, the Committee explained:

> The Conferees believe that the owner or operator of what is to be a new source has a degree of flexibility in planning, design, construction, and location that is not available to the owner or operator of an existing source. The Conferees concluded, therefore, that it would be both appropriate and useful for the Administrator to consider the various "alternatives" described in * * * NEPA in connection with the proposed issuance of a permit to a new source, whereas * * * consideration of such "alternatives" in connection with the proposed issuance of a permit for existing sources, collectively or individually, would not be appropriate * * *.

118 Cong. Rec. 33,692 ex. 1 (1972), WL FWPCA72-LH A&P 118 Cong. Rec. 33692; *see Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 114 (D.C. Cir. 1988) (Congress' "new source-existing source distinction is premised upon the policy determination that pollution controls implemented during the period of planning and construction of new

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[9]This statutory provision is echoed in the permitting regulations that govern this proceeding. *See* 40 C.F.R. § 124.9(b)(6) ("NPDES permits other than permits to new sources * * * are not subject to the [EIS] provisions of [NEPA]").

plants was 'the most effective and, in the long run, the least expensive approach to pollution control,'" and was to be preferred to the high cost of retrofitting) (quoting S. Rep. No. 92-414, at 58 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3724).

An important twist in the regulatory scheme Congress designed is the definition chosen for the term "new source": i.e., "any source, the construction of which is commenced after the publication of proposed [new source performance standards ("NSPSs")] applicable to such source, if such standard[s are] thereafter promulgated in accordance with this section." CWA § 306(a)(2), 33 U.S.C. § 1316(a)(2); *see also* 40 C.F.R. § 122.2 (regulatory definition of "new source"). NSPSs currently exist or are proposed for a wide array of point source categories, including pulp and paper mills, chemical manufacturing facilities, petroleum refineries, and many others. *See*, *e.g.*, 40 C.F.R. §§ 414.24, .44, .74, 415.25, 419.16, .56, 430.15, .25, .75; 67 Fed. Reg. 8582, 8659, 8669 (Feb. 25, 2002) (to be codified at 40 C.F.R. §§ 432.15, .115); 66 Fed. Reg. 424, 542, 554 (Jan. 3, 2001) (to be codified at 40 C.F.R. §§ 438.16, .86). Notably, however, NSPSs do not exist, nor have they yet been proposed, for every possible point source category. Thus, in some instances, a "new source" (in the everyday sense) of water pollution is not a "new source" (in the CWA sense) due to lack of an NSPS. *See*, *e.g.*, *In re Town of Seabrook*, 4 E.A.D. 806, 816-17 n.20 (EAB 1993) (proposed municipal wastewater treatment plant is not "new source" because no applicable NSPSs exist for such a facility), *aff'd sub nom. Adams v. EPA*, 38 F.3d 43 (1st Cir. 1994); *In re IT Corp.*, 1 E.A.D. 779, 780 (JO 1983) (proposed facility is not "new source" because NSPSs applicable to facility were never proposed or finally promulgated); *see also PA Dep't of Envtl. Res. v. EPA*, 618 F.2d 991, 998-1000 (3d Cir. 1980) (Opinion on Rehearing) (describing implications of 120-day deadline in NSPS promulgation process and affected new sources under CWA § 306(a)(2)); *In re Beker Phosphate Corp.*, 1 E.A.D. 499 (Adm'r 1979) (same).

This is the situation we are confronted with today. In this case, the permit at issue authorizes storm water discharges from construction activities that will disturb more than five acres of land. Region IX stated,

in its response to comments on the draft permit raising questions about NEPA applicability to this project, that, "There is no 'NSPS' for storm water construction, therefore, the permitted source does not qualify as a 'new source' under the CWA and is thus explicitly exempted from NEPA under the CWA." RTC ¶ 13.2, at 21 (citing *NRDC*, 822 F.2d at 127). On appeal, the Yavapai-Apache Nation does not dispute the point that no such storm water-related NSPS exists. Instead, the Nation contends that when the Verde Valley Ranch is considered "not just as a typical residential and commercial development project, but * * * as a permanent newly constructed remediation project for copper mining mill tailing wastes," other NSPSs are applicable to the permitted project. Reply Br. at 3.

Specifically, the Nation points to the NSPS that covers the copper (and other metal) ore mining and dressing point source category. *Id*. (citing portions of 40 C.F.R. pt. 440, subpt. J). According to the Nation, this NSPS prohibits "any discharge of mining wastewater pollutants from copper mines to waters of the United States." *Id*.; *see* 40 C.F.R. § 440.104(a)-(d) (establishing effluent limitations for pollutants in mine drainage and restricting process water discharges from copper mines/mills to waters of the United States). The Nation also contends in its Reply Brief that other NSPSs may be applicable to this project. Reply Br. at 3. At oral argument, however, the Nation conceded that it was, in fact, not aware of any other applicable NSPSs. Tr. at 15.

As it happens, the copper ore mining regulations the Nation cites are applicable only to existing and new ore mining and milling sources, not long-closed and abandoned sources such as the one at issue in this case. *See* 40 C.F.R. § 440.100(a)-(d) (ore mining point source category regulations are applicable to ore mining and milling facilities that "produce" copper or "use" certain processes); *id*. § 440.132(a), (f), (g) (definition of "mine" is "active mining area" where "work or other activity related to the extraction, removal, or recovery of metal ore is being conducted"; "mill" is "preparation facility" where ore "is cleaned, concentrated, or otherwise processed" before being shipped to "customer, refiner, smelter, or manufacturer"); 47 Fed. Reg. 54,598, 54,598 (Dec. 3, 1982) (preamble to ore mining regulations) ("[t]his regulation limits the

discharge of pollutants into navigable waters of the United States from existing and new sources in the ore mining and dressing industry"). Phelps Dodge's planned corrective activities at the Verde Valley Ranch with respect to the mining tailings -- i.e., installation of a cap, liner, and golf course and dewatering the tailings piles -- cannot reasonably be construed as falling within the purview of the copper mining NSPS, which requires active pursuit and processing of new ore rather than treatment of long-abandoned mining waste. *See* 40 C.F.R. §§ 440.104, .132; *cf. PA Dep't of Envtl. Res. v. EPA*, 618 F.2d 991, 993-94 & n.2 (3d Cir. 1980) (discussing discharges attributable to closed or abandoned mines, which are known as "post-mining discharges"). Similarly, Phelps Dodge's active maintenance of the tailings site (i.e., sprinkling with water to reduce dust blowing off the site surface) over the past years, *see* Tr. at 18, also cannot reasonably be categorized as active pursuit or processing of ore within the meaning of the copper mining NSPS. This being the case, the copper mining NSPS is not applicable in this context, and the Yavapai-Apache Nation has not identified any other proposed or existing NSPSs that would potentially encompass the activities at issue here.[10]

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[10]There was discussion at oral argument about pending effluent limitation guidelines and NSPSs for a new construction and development ("C&D") point source category, which would appear to be applicable to the type of activity being permitted in this instance. *See* Tr. at 66-68. Pursuant to a consent decree with the Natural Resources Defense Council, EPA was required to promulgate a proposed C&D rule by March 31, 2002, with final promulgation of the rule by March 31, 2004. The U.S. District Court for the District of Columbia recently extended the deadline for issuance of the proposed rule to May 15, 2002. *See Natural Res. Def. Council, Inc. v. Whitman*, Civ. No. 89-2980 (RCL), Order Modifying Consent Decree (D.D.C. Feb. 13, 2002).

While the pending C&D rule may in the future play a significant role in cases such as this one, the Region's obligation, as the permit issuer, is to apply the CWA statute and implementing regulations in effect at the time the final permit decision is made, not as the statute or regulations may exist at some point in the future. *See* 40 C.F.R. § 122.43(a), (b)(1) (permit conditions must assure compliance with all "applicable requirements" of CWA and regulations; "applicable requirements" include all statutory and regulatory requirements that take effect prior to issuance of permit and may also include, at permit issuer's discretion, important new requirements that become effective during permitting process); *see also In re Homestake Mining Co.*, 2 E.A.D. 195, 199-200 & n.8 (CJO 1986) ("[p]ermit terms and conditions cannot be based on proposed rules (continued...)

We therefore find that the Nation has failed to establish clear error in Region IX's conclusion that the Verde Valley Ranch does not constitute a "new source" for purposes of NEPA compliance under the CWA. As a result, we must deny review on this ground.[11]

2. *Federalization of Entire Project*

The Yavapai-Apache Nation next argues that even if the Verde Valley Ranch does not qualify as a "new source," the project nonetheless has been "federalized" by the issuance of the NPDES permit. In the Nation's view, EPA Region IX exercises control over the entire project, and not just over the storm water component of the project, because, the Nation contends, the Ranch cannot be built without issuance of the NPDES permit. Pet'n at 10-11. The Nation asserts:

> NEPA regulations provide that if the federal involvement in a nonfederal activity is a small component of the entire project, the federal agency's NEPA document need not cover the entire project (e.g., issuance of a U.S. Army Corps of Engineers [ACOE] Section 404 permit for a stream crossing by a pipeline project that traverses miles of upland area). This narrow view is particularly defensible if a project alternative exists that would avoid impacts to the agency's jurisdiction, and thus avoid the need for a permit.

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[10](...continued)
since [the proposed rules] are tentative and may change before being promulgated in final form").

[11]While it seems incongruous to treat the Verde Valley Ranch as anything other than a "new source" (at least in the everyday meaning of these words) of CWA pollution, the Region notes that the Ranch can be considered a "new discharger" under the CWA rather than a "new source." R9 Resp. at 7; *see* 40 C.F.R. § 122.2 ("new discharger" is, among other things, any facility (including land and appurtenances) from which there is or may be a discharge of pollutants to waters of the United States, provided the source is not a "new source," did not commence discharging prior to 1979, and has not previously obtained an NPDES permit).

> The proposed Verde Valley Ranch project, however, is totally dependent on the issuance of the NPDES Permit. No project alternative exists that would negate the need for the Permit. The entire project is therefore "federalized" because the project is not possible without issuance of the federal permit.
>
> In addition, the touchstone of "major Federal action" is a federal agency's actual power to control the nonfederal activity. Here EPA also exerted actual power over the project, by delisting the project from its status as a Superfund [s]ite under CERCLA, and purportedly requiring remediation under the [CWA], and state aquifer protection permits, in lieu of remediation under CERCLA.
>
> In addition, the Yavapai-Apache Nation alleges that the municipal wastewater treatment plant proposed for the project will require and receive federal funding from various federal sources, and that NEPA compliance is required for this additional reason.

Pet'n at 11-12; *see* Reply Br. at 5-6; Tr. at 19, 82-83. The Region does not respond to these arguments, but Phelps Dodge contends that the Board need not address federalization because the issue is irrelevant in light of the explicit statutory NEPA exemption set forth in CWA section 511(c)(1). PD Resp. at 8-9.

The doctrine of "federalization" is a judge-made one that came into being as courts determined, on the basis of NEPA and its implementing regulations, that federal involvement in private, state, or local action can in certain circumstances render that action "federal" for NEPA purposes. Courts typically look to the degree of federal involvement and federal control in determining whether a nonfederal action has been federalized. *See*, *e.g.*, *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1397 (9th Cir. 1992); *Macht v. Skinner*, 916 F.2d 13, 18-20 (D.C. Cir. 1990); *Biderman v. Morton*, 497 F.2d 1141, 1147 (2d Cir.

1974). In so doing, courts have devised a myriad of federalization tests, formulas, and criteria, which can be grouped into two general categories: (1) tests based on "legal enablement or control"; and (2) tests based on "factual enablement or control." *See Macht*, 916 F.2d at 18-19; *Winnebago Nation of Neb. v. Ray*, 621 F.2d 269, 272-73 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980).

On the legal enablement/control side, if a particular federal action is a legal condition precedent for a nonfederal project, courts may find the entire project to be federalized. *See*, *e.g.*, *Cady v. Morton*, 527 F.2d 786, 793-95 (9th Cir. 1975) (federal grant of Crow Nation coal leases was legal condition precedent for private strip mining project); *Nat'l Forest Pres. Group v. Butz*, 485 F.2d 408, 411-12 (9th Cir. 1973) (U.S. Forest Service exchange of government lands for lands belonging to railroad enabled private action and federalized entire project); *Greene County Planning Bd. v. Fed'l Power Comm'n*, 455 F.2d 412, 418-24 (2d Cir.) (State of New York transmission lines could not be strung without Federal Power Commission license), *cert. denied*, 409 U.S. 849 (1972). As for factual enablement/control, courts tend to federalize nonfederal action in cases where: (1) the federal government has control over the planning and development of the nonfederal action; (2) the nonfederal action has received federal funding; or (3) federal provision of goods or services to the nonfederal action renders the action a federal/nonfederal partnership or joint venture. *See*, *e.g.*, *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042-43 (4th Cir. 1986) (state highway project federalized because substantial portions of project required federal approvals, including wetlands permits); *Thomas v. Peterson*, 753 F.2d 754, 757-61 (9th Cir. 1985) (private timber harvesting "inextricably intertwined" with federally approved timber roads); *Sierra Club v. Hodel*, 544 F.2d 1036, 1044 (9th Cir. 1976) (Bonneville Power Administration federalized private silica-magnesium plant by entering into contract to construct transmission line and supply power to plant); *Homeowners Emergency Life Prot. Comm. v. Lynn*, 541 F.2d 814, 817 (9th Cir. 1976) (grant of federal funds federalized city dam and reservoir project).

In this case, the Yavapai-Apache Nation's argument that the entire Verde Valley Ranch project should be federalized is an interesting

but ultimately futile one. The Nation rightly points out that multiple federal actions have been and will be needed to authorize various components of this project. For example, the NPDES permit at issue in this appeal will authorize storm water discharges from the construction and operation of the development;[12] CWA section 404 permits authorize discharges of dredged or fill material into federally protected wetlands on the property; EPA evaluated the site pursuant to CERCLA and chose to rely on the CWA and administrative enforcement actions thereunder to achieve site remediation; and federal agencies were required to consult about rare species/habitats and historic resources affected by the proposed project. All these actions, the Nation contends, establish the enormous significance of this project and argue in favor of the preparation of an EIS containing a detailed analysis of the individual and cumulative adverse effects of the project. Pet'n at 10-12; Reply Br. at 5-6. Moreover, without the federal storm water permit, the Nation claims, the private Phelps Dodge project could not go forward as planned. The Nation in essence argues that the permit is a legal condition precedent to the development of the Ranch that mandates federalization of the entire project and the preparation of an EIS therefor. *See* Pet'n at 10-11; Reply Br. at 5-6; Tr. at 19, 82-83.

In the foregoing section, we explained that Phelps Dodge's storm water permit falls within a category of federal actions taken pursuant to the CWA that Congress explicitly exempted from NEPA review. There

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[12]We note, without deciding, that several cases would appear to argue against a finding of whole-project federalization solely on the basis of a federally issued NPDES permit. *See*, *e.g.*, *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 130 (D.C. Cir. 1988) (NPDES permit may be needed for construction but is "most certainly not a legal condition precedent"; "although issuance of a discharge permit is an absolute precondition to *operation* of a facility, we are persuaded that the NPDES permit process does not constitute sufficient federal involvement to 'federalize' the private act of construction"; "[i]t is, in short, the permitting, not the construction, which EPA has power to restrain pending NEPA review"); *cf*. *Save the Bay, Inc. v. U.S. Corps of Eng'rs*, 610 F.2d 322, 327 (5th Cir.) (federal permit for construction of effluent pipeline from private titanium dioxide manufacturing plant does not federalize entire plant; pipeline is not a necessity for plant operation because at least one other alternative method of discharge was available to plant operator), *cert. denied*, 449 U.S. 900 (1980).

is nothing, to our knowledge, in the federalization case law that would overcome this fact, and nothing to that effect has been pointed out to us. The doctrine of federalization cannot be used, as the Nation suggests, to reach by the back door a goal -- NEPA review -- whose achievement Congress expressly rejected at the front door (i.e., the CWA). It is vital to realize that the question here is not whether the project is a "major federal action significantly affecting the quality of the human environment"; it most likely is, as evidenced in part by EPA's exercise of CWA section 402(p)(2)(E) authority to require continuing NPDES permits for storm water discharges from the site.[13] The question, rather, is whether NEPA applies; in answer, no less than Congress itself has said no. Thus, even if the Nation were to successfully convince us that the entire Verde Valley Ranch project were federalized on the basis of the NPDES permit's issuance, that conclusion would not and indeed could not change the fact that Congress expressly exempted non-"new sources" from the NEPA-EIS review petitioners seek. Therefore, review must be denied on this ground.

3. *Functional Equivalency*

Finally, the Yavapai-Apache Nation contends that even if the CWA section 511(c) exemption excuses NEPA compliance for this NPDES permit, Region IX nonetheless must conduct a procedurally and substantively equivalent analysis to that mandated under NEPA. The Nation postulates:

> EPA is exempt from compliance with NEPA sometimes when it engages in regulatory activities designed to protect the environment. This exemption is based on the theory that EPA's environmental evaluations and regulatory programs are "functionally equivalent" to the requirements of NEPA, thus making

[13]As mentioned in Part I.A above, EPA has discretion to require NPDES permits for sources whose storm water discharges will, the Agency believes, contribute to a violation of a state water quality standard or be significant contributors of pollutants to waters of the United States. CWA § 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E).

> preparation of a NEPA document duplicative. Under the functional equivalency exemption, EPA must broadly consider the impacts of its actions by conducting (or requiring) appropriate technical studies and by providing the public and responsible agencies opportunities for comment.

Pet'n at 12.

The Nation goes on to assert that Region IX "has failed the test of functional equivalency for the Verde Valley Ranch project." *Id.*; *see* Reply Br. at 6-8. The Nation contends that in the course of issuing the NPDES permit, Region IX failed to consider and fully disclose to the public all of the direct, indirect, and cumulative adverse impacts on water resources, endangered species, cultural resources, air quality, and other elements that will be generated as a result of the proposed project. Pet'n at 12-13; *see* Tr. at 13, 20-21, 85, 92. The Nation also points out that Region IX did not consider alternatives to the proposed project, such as the "no-action" alternative or alternatives involving other locations or other lead agencies or other remedial options, but rather considered only the project favored by Phelps Dodge. Pet'n at 13. In light of these purported failures, the Nation contends that Region IX also failed to develop appropriate mitigation measures for "the full range of environmental concerns" and a "reasonable range of project alternatives," as required by NEPA. *Id*. at 15. The Nation also questions the adequacy of the Region's interagency consultation and coordination processes. *Id*. at 14-15. The Nation does not consider the individual NPDES permitting process to be functionally equivalent to NEPA and therefore argues that the Board should grant review on the basis of Region IX's failure to evaluate these NEPA factors. *Id*. at 12-17; Reply Br. at 6-7; Tr. at 13, 85.

The doctrine of functional equivalence is another judge-made doctrine in which courts excuse NEPA compliance in cases where a federal action is subject to statutory and regulatory requirements that essentially duplicate the NEPA inquiry. *See*, *e.g.*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 384-86 (D.C. Cir. 1973) (EPA promulgation of stationary source standards pursuant to Clean Air Act

§ 111 is functionally equivalent to NEPA EIS), *cert. denied*, 417 U.S. 921 (1974); *In re Am. Soda, Inc.*, UIC Appeal Nos. 01-01 & 01-02, slip op. at 15-17 (EAB June 30, 2000), 9 E.A.D. ___ (issuance of underground injection control permit is functionally equivalent to NEPA EIS) (citing 40 C.F.R. § 124.9(b)(6)). An early case on this topic implied that functional equivalence could only be found if the authorizing statute required agency consideration of the five specific core elements of an EIS.[14] *See Envtl. Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1256 (D.C. Cir. 1973) ("*EDF*") ("all of the five core NEPA issues were carefully considered" in Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") registration cancellation action, so "the functional equivalent of a NEPA investigation was provided"). That same court later clarified that functional equivalence could be present in cases where the statute mandated "orderly consideration of diverse environmental factors," rather than the five specific NEPA-EIS elements.[15] *Amoco Oil Co. v. EPA*, 501 F.2d 722, 750 (D.C. Cir. 1974). That is the accepted state of the doctrine today. *See*, *e.g.*, *Anchorage v. United States*, 980 F.2d 1320, 1329 (9th Cir. 1992) (memorandum of agreement between EPA and

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[14]As mentioned in the Part II.A introduction above, the five core NEPA EIS elements are: (1) the environmental impact of the action; (2) potential adverse environmental effects; (3) potential alternatives; (4) the relationship between long- and short-term uses of the environment; and (5) any irreversible commitments of resources. *See* NEPA § 102(2)(C)(i)-(v), 42 U.S.C. § 4332(2)(C)(i)-(v).

[15]This was also recognized in a pre-Board case involving EPA's issuance of a Resource Conservation and Recovery Act ("RCRA") permit for a hazardous waste treatment, storage, and disposal facility. In *In re Chemical Waste Management, Inc.*, the EPA Administrator determined that in order to show functional equivalency to NEPA, EPA need not demonstrate that it has addressed all five elements of an EIS as set forth in NEPA, but, rather:

> The better view is that NEPA is fulfilled where the federal action has been taken by an agency with recognized environmental expertise and whose procedures ensure extensive consideration of environmental concerns, public participation, and judicial review.

In re Chem. Waste Mgmt., Inc., 2 E.A.D. 575, 578 (Adm'r 1988), *aff'd sub nom. Ala. ex rel. Siegelman v. EPA*, 911 F.2d 499 (11th Cir. 1990).

Corps of Engineers setting forth wetlands mitigation policies not subject to NEPA because "the duties and obligations imposed on the EPA by Congress under the CWA will insure that any action taken by [EPA] under [CWA] section 404(b)(1) will have been subjected to the 'functional equivalent' of NEPA requirements); *W. Neb. Res. Council v. EPA*, 943 F.2d 867, 871-72 (8th Cir. 1991) (EPA approval, pursuant to Safe Drinking Water Act, of Nebraska's exemption of 3,000 acres of aquifer from state underground injection program is functionally equivalent to NEPA review); *Ala. ex rel. Siegelman v. EPA*, 911 F.2d 499, 504-05 (11th Cir. 1990) (EPA's issuance of RCRA permit to hazardous waste management facility is functionally equivalent to NEPA review); *Merrell v. Thomas*, 807 F.2d 776, 780-81 (9th Cir. 1986) (pesticide registration under FIFRA is functionally equivalent to NEPA review), *cert. denied*, 484 U.S. 848 (1987); *Pac. Legal Found. v. Andrus*, 657 F.2d 829, 834-40 (6th Cir. 1981) (listing of species under ESA is functionally equivalent to NEPA review).

In the course of issuing the NPDES permit for the Verde Valley Ranch, Region IX did not engage in an analysis of alternatives to the proposed project or all of its possible direct, indirect, and cumulative adverse effects, as required by NEPA (the extent of this analysis depending, of course, on the scope of review selected under NEPA, i.e., either NPDES-permit only or entire project). The Region contends that it had no obligation to evaluate alternatives to the proposed project because NEPA review is not required for this NPDES permit. R9 Resp. at 9 (citing *In re Town of Seabrook*, 4 E.A.D. 806, 816-17 (EAB 1993), *aff'd sub nom. Adams v. EPA*, 38 F.3d 43 (1st Cir. 1994); *In re IT Corp.*, 1 E.A.D. 779, 780 (JO 1983)).

We need not decide whether the NPDES permitting analysis engaged in by Region IX in this instance was functionally equivalent to NEPA,[16] for the entire concept of functional equivalence is misplaced

[16]We note, however, that, as discussed in Part II.F, *infra*, EPA Region IX conceded at oral argument that the environmental analyses conducted for the Verde Valley Ranch did not approximate the depth of analysis that might have been required (continued...)

here. Functional equivalence is a doctrine courts wield to facilitate environmental decisionmaking by ensuring federal agencies are not forced to expend scarce resources conducting duplicative environmental analyses. *See EDF*, 489 F.2d at 1256 ("'To require a 'statement,' in addition to a decision setting forth the same considerations would be a legalism carried to the extreme.'") (quoting *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 n.130 (D.C. Cir. 1973)). It must be understood that the functional equivalence doctrine *exempts* federal action from NEPA's requirements and as such *presupposes NEPA applicability in the first instance*. If, as here, NEPA is not applicable to a particular federal action because some other exemption excuses compliance, there is no need for a court to impose the functional equivalence exemption (or any other exemption for that matter) to ensure environmental decisionmaking is not fruitlessly duplicated and delayed.

Thus, while the Nation may or may not be correct in arguing that the NPDES permit process was not functionally equivalent to NEPA,[17] the Nation's argument cannot carry the day. We hold that Region IX did not commit clear error in its determination that an EIS, or the functional equivalent to an EIS, was not required for this NPDES permit, and we find no other policy consideration or exercise of discretion here that warrants review. *See* 40 C.F.R. § 124.19(a)(1)-(2). Review on this ground is therefore denied.

B. *Endangered Species Act*

1. *Overview of Statutory/Regulatory Scheme*

The Yavapai-Apache Nation next raises a series of challenges to Region IX's efforts to comply with the Endangered Species Act, 16

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[16](...continued)
had the remediation of the site proceeded pursuant to CERCLA.

[17]*Cf. Am. Soda*, slip op. at 17, 9 E.A.D. ___ (holding 40 C.F.R. § 124.9(b)(6) to be codification of functional equivalence exemption in underground injection well context); *In re IT Corp.*, 1 E.A.D. 777, 778 (Adm'r 1983) (same in RCRA context)).

U.S.C. §§ 1531-1544. The ESA, enacted in 1973, has two primary components: (1) a federal government action and interagency cooperation program, found in section 7; and (2) a list of prohibited acts, found in section 9. Section 7 requires all federal agencies to ensure, through consultation with the Secretary of the Interior,[18] that their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of a species' critical habitat. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). Section 9, for its part, makes it illegal to "take" (i.e., harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect) protected fish or wildlife species or remove, damage, destroy, or import/export protected plant species. ESA §§ 4(d), 9(a)(1)-(2), 16 U.S.C. §§ 1533(d), 1538(a)(1)-(2); *see* 50 C.F.R. §§ 17.21, .31, .61, .71.

Section 9 prohibitions exist at all times and in all places, whereas section 7 responsibilities come into play only when a regulated "agency action" -- such as the issuance of a federal permit -- is pending. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.01-.02; *see* 40 C.F.R. § 122.49(c) (ESA procedures must be followed when issuing NPDES permit). Federal agencies typically begin the section 7 process by determining whether a proposed action "may affect," directly or

[18]The Secretary of the Interior, whose ESA authority is exercised by FWS, has jurisdiction over terrestrial and freshwater aquatic species. The Secretary of Commerce also has jurisdiction under the ESA, in its case over marine species, and the National Marine Fisheries Service acts on Commerce's behalf in this regard. *See* ESA §§ 3(15), 4, 16 U.S.C. §§ 1532(15), 1533. In light of the fact that only terrestrial and freshwater aquatic species are implicated by this permit, we will refer to "FWS" exclusively throughout the remainder of this opinion.

indirectly, listed species[19] or designated critical habitat[20] in a particular geographical area.[21] That area, called the "action area," includes "all areas to be affected directly or indirectly by the [f]ederal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. "Direct effects" are a project's immediate impacts on listed species or their habitats, *see Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987), while "indirect effects" are effects "that are caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. § 402.02 ("effects of the action" definition). The "effects of the action" also include the effects of other actions that are "interrelated or interdependent with" the project.[22] *Id*. Agencies may

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[19]A "listed species" is "any species of fish, wildlife, or plant [that] has been determined to be endangered or threatened under section 4 of the [ESA]." 50 C.F.R. § 402.02. Species currently on the endangered and threatened lists are set forth in 50 C.F.R. §§ 17.11-.12.

[20]"Critical habitat" consists of specific areas containing physical and biological features that are "essential to the conservation of the species" and that may require special management or protection. ESA § 3(5)(A), 16 U.S.C. § 1532(5)(A); *see* 50 C.F.R. § 402.02 (definition of "critical habitat"); 50 C.F.R. pts. 17, 226 (critical habitat lists).

[21]*See* 50 C.F.R. § 402.14(a) ("Each [f]ederal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.").

[22]"Interrelated actions" are "those that are part of a larger action and depend on the larger action for their justification." "Interdependent actions" are "those that have no independent utility apart from the action under consideration." 50 C.F.R. § 402.02 ("effects of the action" definition). "The test for interrelatedness or interdependentness is 'but for' causation: but for the federal project, these activities would not occur." *Marsh*, 816 F.2d at 1387; *see* 51 Fed. Reg. 19,926, 19,932 (June 3, 1986) (preamble to final rule) ("the 'but for' test should be used to assess whether an activity is interrelated with or interdependent to the proposed action").

document their "may affect" determinations in something called a "biological assessment" ("BA").[23]

If an agency decides its proposed action will have no effect on listed species or designated habitat in the action area, the section 7 process ends. 50 C.F.R. § 402.14(a). If, however, the agency decides the action "may affect" these entities, the agency must then consider whether the action is "likely to have an adverse effect" on protected species or habitat. *Id*. § 402.14(b)(1). An affirmative answer to this inquiry leads to the initiation of formal section 7 consultation with FWS.[24] *Id*. § 402.14(a)-(c). During consultation, the "action agency" (in this case, EPA) is tasked with certain data-gathering obligations. The action agency must provide FWS with the "best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat."[25] ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2); 50 C.F.R.

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[23]The term "biological assessment" is a term of art under the ESA. *See* ESA § 7(c), 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12. BAs are required only for "major construction projects," which are projects that qualify as major federal actions significantly affecting the quality of the human environment, as defined in NEPA. 50 C.F.R. § 402.02. However, agencies are not precluded by statute or regulation from voluntarily preparing BAs for other kinds of projects, and they frequently do so.

[24]A negative answer, meaning the agency decides the action is not likely to have an adverse effect, ends the section 7 process provided FWS concurs in writing with the agency's determination. If FWS declines to concur, the action agency must either initiate formal consultation or revise the project to avoid the adverse impacts. *See* 50 C.F.R. §§ 402.13, .14(b)(1).

[25]The formal consultation phase lasts for 90 days, although this period may be extended by mutual agreement of the action agency and FWS. (Note, however, that if a private applicant is involved, the time limit may not be extended for more than 60 days without that applicant's consent.) ESA § 7(b)(1), 16 U.S.C. § 1536(b)(1); 50 C.F.R. § 402.14(e).

If FWS determines additional research is needed to analyze the effects of an action, FWS may ask the action agency to conduct further studies. If the action agency
(continued...)

§ 402.14(d); *see* 50 C.F.R. § 402.14(g)(8). The permit applicant may also submit information for consideration.[26] 50 C.F.R. §§ 402.08, .14(d).

Formal consultation culminates in the issuance of a "biological opinion" ("BiOp") (not to be confused with the "BA" mentioned above that documents an agency's "may affect" determination), which is the FWS's opinion as to whether the proposed agency action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. ESA § 7(b)(3), 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.02. If the biological evidence indicates that the proposed action is not likely to jeopardize protected species or destroy or adversely modify critical habitat, the FWS will issue a "no jeopardy opinion." 50 C.F.R. § 402.14(h)(3). If, however, the evidence indicates otherwise, FWS will issue a "jeopardy opinion," which must include "reasonable and prudent alternatives" to the agency's proposed action, if any such alternatives exist. ESA § 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). Biological opinions of any stripe (i.e., "jeopardy" or "no jeopardy") can also authorize the "incidental take" of listed species that will be caused as a result of the proposed federal action. ESA § 7(b)(4), 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). FWS may condition an incidental take permit on the

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[25](...continued)
agrees the studies are necessary, it must obtain the data "to the extent practicable" within the 90-day (or longer if extended) consultation period. 50 C.F.R. § 402.14(f). The action agency is ultimately responsible for deciding whether its decision is based on the best data available, so the agency has discretion (subject to the arbitrary and capricious standard) to reject FWS's request. 51 Fed. Reg. 19,926, 19,952 (June 3, 1986).

[26]Under the ESA regulations, an action agency may designate the permit applicant or other entity (such as an environmental consulting firm) as a nonfederal representative for purposes of preparing a BA. 50 C.F.R. §§ 402.08, .14(d). In such instances, the agency must supply the nonfederal representative with "guidance and supervision" and must "independently review and evaluate the scope and contents" of the BA. 50 C.F.R. § 402.08. In all cases, the ultimate responsibility for compliance with section 7 remains with the action agency. *Id*.

implementation of "reasonable and prudent measures" it deems necessary to minimize impact on the species. ESA § 7(b)(4)(ii), 16 U.S.C. § 1536(b)(4)(ii).

Following the FWS's issuance of a BiOp, the action agency must determine "whether and in what manner to proceed with the action in light of its section 7 obligations and the [FWS's BiOp]." 50 C.F.R. § 402.15(a); *see In re Dos Republicas Res. Co.*, 6 E.A.D. 643, 666 n.69 (EAB 1996). The agency's substantive obligations under the ESA -- i.e., to ensure that its actions are not likely to jeopardize listed species or destroy or adversely modify critical habitat -- are generally satisfied by reasoned reliance on the FWS's expert opinion, as documented in the BiOp, even in cases where the BiOp is based on "admittedly weak" information, provided the information is the best available at that time. *See*, *e.g.*, *Pyramid Lake Paiute Nation v. Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) ("[a] federal agency cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a FWS [BiOp] must not have been arbitrary or capricious"); *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984) (Federal Highway Administration relied on FWS BiOp after considering all relevant factors and employing best available scientific data, so even though data were uncertain, the agency's reliance on the BiOp was not arbitrary, capricious, or abuse of discretion), *cert. denied sub nom. Yamasaki v. Stop H-3 Ass'n*, 471 U.S. 1108 (1985); *see also Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992) ("When an agency relies on the analysis and opinion of experts and employs the best evidence available, the fact that the evidence is 'weak,' and thus not dispositive, does not render the agency's determination 'arbitrary and capricious.'"). One exception to this rule arises when parties identify "new" information that challenges the BiOp's conclusions and that FWS did not take into account in preparing the BiOp. *See*, *e.g.*, *Pyramid Lake*, 898 F.2d at 1415-16 (appellant put forth no new information that FWS did not take into account in rendering its BiOp, and record contains no other data that "seriously undermines" the BiOp, so Navy's reliance on BiOp was not arbitrary and capricious); *Stop H-3*, 740 F.2d at 1460 (testimony challenging BiOp conclusions but containing no information not already evaluated by FWS is not ground

for finding that Federal Highway Administration committed substantive violation of ESA).

2. *Overview of ESA Documentation Pertaining to Verde Valley Ranch*

Both the U.S. Army Corps of Engineers and EPA Region IX served as ESA "action agencies" in connection with their review and ultimate issuance of CWA permits to Phelps Dodge for the Verde Valley Ranch. The Corps engaged in ESA section 7 consultation with FWS regarding the three nationwide wetlands permits needed for the project, and one BA and two BiOps ultimately resulted from that work. *See* Resp. Ex. 11 (SWCA, Inc., *Biological Assessment for the Verde Valley Ranch* (Sept. 1993)) ("1993 BA"); Resp. Ex. 12 app. B (Letter from Sam F. Spiller, State Supervisor, FWS, to John A. Gill, ACOE (Nov. 9, 1994)) ("1994 BiOp") ("no jeopardy" determination for razorback sucker, bald eagle, and Colorado squawfish; "no effect" determinations for peregrine falcon, Arizona cliffrose, spikedace, and Mexican spotted owl; and "no adverse effect" determination for razorback sucker critical habitat); Resp. Ex. 12 app. B (Letter from Nancy M. Kaufman, Regional Director, FWS, to John A. Gill, ACOE (Feb. 1996)) ("1996 BiOp") (finding proposed Verde Valley Ranch will jeopardize continued existence of southwestern willow flycatcher and result in adverse modification of its proposed critical habitat; specifying reasonable and prudent measures to protect flycatcher and habitat).

EPA Region IX later engaged in a separate ESA section 7 consultation with FWS to address the impacts of the NPDES permit for storm water discharges. Two BAs -- the "1996 BA" and the "1998 BA" -- and two BiOps -- the "1997 BiOp" and the "1999 BiOp" -- resulted from these agencies' efforts. The 1996 BA and 1997 BiOp examined Verde Valley Ranch's storm water impacts on a number of species (i.e., bald eagle, peregrine falcon, Mexican spotted owl, southwestern willow flycatcher, razorback sucker, and Colorado squawfish; the BA also examined the spikedace and Arizona cliffrose), whereas the 1998 BA and 1999 BiOp focused solely on impacts to the Yuma clapper rail. *See* Resp. Ex. 12 (SWCA, Inc., *Biological Assessment for Verde Valley*

Ranch Storm Water Construction Permit (Aug. 1996)) ("1996 BA"); Resp. Ex. 22 (Letter from Sam F. Spiller, Field Supervisor, FWS, to Alexis Strauss, Acting Director, Water Division, EPA Region IX (Oct.7, 1997)) ("1997 BiOp"); Pet'r Ex. F (SWCA, Inc., *Addendum to Biological Assessment for Verde Valley Ranch Storm Water Construction Permit* (Apr. 1998)) ("1998 BA"); Pet'r Ex. F (Letter from David L. Harlow, Field Supervisor, FWS, to Alexis Strauss, Director, Water Division, EPA Region IX (Sept. 10, 1999)) ("1999 BiOp").

3. *Petitioner's ESA Arguments*

In this case, the Yavapai-Apache Nation contends that Region IX committed clear error by failing to conduct an adequate ESA analysis for the Verde Valley Ranch project. The Nation argues this point by attacking perceived flaws in the 1997 BiOp and the 1999 BiOp prepared by FWS and relied on by Region IX in establishing storm water permit conditions. With respect to the 1997 BiOp, the Nation identifies alleged deficiencies regarding the: (1) scope of ESA review; (2) impacts to critical habitat for the endangered southwestern willow flycatcher; (3) cumulative impacts on species of concern, including the flycatcher; (4) impacts to the endangered razorback sucker; (5) potential effects of underground water pumping on riparian habitat; (6) differences between terms and conditions in the draft and final BiOps; and (7) impacts of runoff on receiving waters and associated sediment disturbance. With respect to the 1999 BiOp, the Nation contends: (1) the underlying BA (i.e., the 1998 BA, mentioned above) contains numerous deficiencies and thus the BiOp, which relies on the inadequate 1998 BA, is "flawed and invalid"; and (2) the NPDES permit conditions, derived from the BiOp, are not sufficiently protective because they call for monitoring rather than specific mitigation with back-up contingency plans. We address each of these points below.

a. *1997 Biological Opinion*

i. *Scope of Review*

The Yavapai-Apache Nation first challenges the scope of review Region IX selected for the 1997 BiOp. The Nation claims that the BiOp addresses impacts on species and habitat caused only by the NPDES permit, rather than by the entire Verde Valley Ranch project. According to the Nation, "the analysis of project impacts * * * is limited to the effects of storm water runoff, even though the more serious [e]ffects * * * will result from the urbanization of the setting and habitat degradation. * * * The entire project must be considered 'federalized;' therefore, the scope of analyses contained in the [BiOp] must address the impacts of the entire project." Pet'n at 30-31.

In making this argument, the Nation overlooks the section 7 consultation engaged in in the early-to-mid 1990s by the Corps and FWS for the wetlands permits needed by Verde Valley Ranch.[27] As mentioned above, that consultation resulted in two BiOps, dated November 9, 1994, and February 27, 1996, which addressed the direct, indirect, and cumulative effects of the entire Verde Valley Ranch project on protected species and habitat, except for the effects of the storm water components. *See* 1994 BiOp at 7-10; 1996 BiOp at 12-15. In a letter regarding the scope of the pending section 7 consultation for the storm water permit, FWS explained:

> [T]he scope of [the Corps/FWS wetlands permit] consultations included the sum effects to listed species of the [Verde Valley Ranch] development excluding the storm water system. Those direct, indirect, and interrelated and interdependent effects [that] have been

[27]That consultation was conducted to authorize CWA section 404 nationwide permits at Verde Valley Ranch for three actions: (1) utility crossing of the Verde River; (2) outlet structure and road crossing at Peck's Lake; and (3) a dry wash road crossing. 1996 BA at 2.

> consulted on include: increases in the number of people living and recreating in the vicinity; construction and presence of structures not related to storm water management; proximity of structures and people to riparian habitat; and the relationship to increases in predation and cowbird parasitism of listed species. As stated in the past [BiOps], storm water management was not consulted on. Those direct, indirect, interrelated and interdependent effects to be assessed as part of the storm water permitting include: structures associated with storm water conveyance, diversion, and/or storage; water quality, surface runoff, and transfer of pesticides and ground contaminants into the riparian and aquatic systems; and/or other issues related to water quality.

1996 BA app. A at 1-2 (Letter from Sam F. Spiller, Field Supervisor, FWS, to John Thomas, SWCA Environmental Consultants 1-2 (July 30, 1996)). FWS went on to opine that in its view, the wetlands and storm water consultations should have been combined, with a lead and a cooperating federal action agency (Corps, EPA) consulting with FWS. *Id*. at 2 ("A more comprehensive analysis could have been conducted on the listed species in the area, and it probably would have saved time and money for all parties involved."). However, as that did not happen, FWS stressed that it would "make every effort [in the NPDES permit consultation process with Region IX] to avoid repetition of issues addressed in the past biological opinions and to be consistent with those consultations." *Id*. at 1.

This approach is entirely consistent with the ESA regulatory scheme, which specifically provides for the incorporation by reference of certain prior biological assessments. The regulations state:

> If a proposed action requiring the preparation of a [BA] is identical, or very similar, to a previous action for which a [BA] was prepared, the [f]ederal agency may fulfill the [BA] requirement for the proposed action by incorporating by reference the earlier [BA], plus any

> supporting data from other documents that are pertinent to the consultation, into a written certification that:
>
> > (1) The proposed action involves similar impacts to the same species in the same geographic area;
> > (2) No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and
> > (3) The [BA] has been supplemented with any relevant changes in information.

50 C.F.R. § 402.12(g).

EPA and FWS found themselves in this type of situation when, on the heels of the Corps/FWS consultation for the wetlands permits, they embarked on consultation for the storm water permit. During that consultation, earlier Verde Valley Ranch BAs were explicitly incorporated by reference into later Verde Valley Ranch BAs, in accordance with 50 C.F.R. § 402.12(g). *See* 1998 BA at 1-1 (incorporating by reference 1993 and 1996 BAs); 1996 BA at 8 (incorporating by reference 1993 BA). Therefore, while the Yavapai-Apache Nation is correct in arguing that the scope of ESA review conducted for the NPDES permit was limited to the effects caused only by the storm water system, we find, on the basis of 50 C.F.R. § 402.12(g), that the Nation is wrong to argue that the comprehensive biological analyses conducted during the wetlands permitting process should be repeated.[28] We find no clear error or other reason to grant

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[28]At oral argument, the Nation raised questions about the comprehensiveness of the biological analyses conducted for the wetlands permits issued to Phelps Dodge in this case. The Nation contended that because the wetlands permits were nationwide or general permits -- i.e., permits that constitute, in the Nation's words, "shorthand" section 404 permits -- "very little environmental analysis was done." Tr. at 92; *see also* Pet'n at (continued...)

review of Region IX's treatment of this issue. *See* 40 C.F.R. § 124.19(a). Review is denied on this ground.

ii. *Southwestern Willow Flycatcher Critical Habitat*

Next, the Yavapai-Apache Nation takes issue with language FWS used in the 1997 BiOp to discuss impacts on proposed critical habitat for the endangered southwestern willow flycatcher.[29] Pet'n at 31. FWS stated:

> Adverse effects on constituent elements or segments of critical habitat generally do not result in [an] adverse modification determination unless that loss, when added to the environmental baseline, is likely to result in

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[28](...continued)
29 (arguing that Region IX failed to properly conduct ESA analysis for entire project). This statement appears to conflict with FWS's view of the scope of review selected for the wetlands permits. As mentioned above, FWS stated, "[T]he scope of [the Corps/FWS wetlands permit] consultations included the sum effects to listed species of the [Verde Valley Ranch] development excluding the storm water system." 1996 BA app. A at 1-2 (Letter from Sam F. Spiller, Field Supervisor, FWS, to John Thomas, SWCA Environmental Consultants 1-2 (July 30, 1996)). Moreover, the 1993 BA and 1994 and 1996 BiOps themselves appear to take a broad view of whole-project impacts on species and habitats rather than a purely wetlands-permit-specific view of impacts on those resources. *See* 1993 BA at 26-29 (examining indirect and interrelated effects of permit action, which are "all other effects [other than direct permit-related effects] resulting from the development of the uplands for residential and ancillary commercial use"); 1994 BiOp at 7-10 (analyzing direct, indirect, and cumulative effects); 1996 BiOp at 12-15 (same). Thus, as we lack any more information from the Nation regarding specific deficiencies in these analyses, we are unable to find clear error or other reason to grant review on this ground.

[29]Given that FWS is not a party to this proceeding, we are mindful of the fact that the FWS's actions and omissions in preparing BiOps are relevant here only to the extent that they demonstrate whether EPA Region IX's reliance on the BiOps constitutes clear error or an exercise of discretion or important policy consideration the Board should review. *See* 40 C.F.R. § 124.19(a); *Pyramid Lake Paiute Nation v. Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

> significant adverse effects throughout the species' range, or appreciably lower the capacity of the critical habitat to support the species.

1997 BiOp at 42. According to the Nation:

> The qualifiers "significant" and "appreciably" [in the above quote] * * * are included in the [BiOp] without explanation, apparent merit or justification and are contrary to the intent of the statute. The southwestern willow flycatcher is an endangered species; take of any critical habitat acreage is reasonably an adverse impact, and USFWS provides no basis for concluding that this adverse impact will not be *significant*. Further, no quantified information is provided to support the conclusion that the project will not *appreciably* lower the capacity of the critical habitat to support the species. Even if the acreage of willow flycatcher habitat at the project site is relatively small compared with the statewide acreage of critical habitat (and this is not demonstrated, it is merely an unfounded assertion implicit in the conclusion), the relative value of the willow flycatcher habitat in the project area has not been analyzed.

Pet'n at 31-32.

Neither Region IX nor Phelps Dodge responds directly to these arguments. *See* R9 Resp. at 35; PD Resp. at 13-16. Our own review of the situation, however, indicates that FWS's use of the word "appreciably" in this context appears to be specifically contemplated in the ESA regulations. *See* 50 C.F.R. § 402.02 ("[d]estruction or adverse modification" means "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species"). To the extent the Nation is challenging this regulation as insufficient in its adherence to the intent of the statute, we decline to entertain such a claim. *See In re Woodkiln, Inc.*, 7 E.A.D. 254,

269-70 (EAB 1997) ("the Board has refused to review final [EPA] regulations that are attacked because of their substantive content or alleged invalidity, both in the exercise of the Board's permit review authority and in the enforcement context") (citing cases); *In re B.J. Carney Indus.*, 7 E.A.D. 171, 194 (EAB 1997) ("there is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding * * * 'and a review of a regulation will not be granted absent the most compelling circumstances'") (quoting *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994)).

Moreover, the concept of adverse effects to a "significant" portion of a species' range -- which would likely include at least some portion of its critical habitat, if designated -- is contained in the statutory definitions of "endangered" and "threatened." ESA § 3(6), 16 U.S.C. § 1532(6) ("endangered species" means any species that "is in danger of extinction throughout all or a significant portion of its range"); *id*. § 3(20), 16 U.S.C. § 1532(20) ("threatened species" means any species that "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range"). While the language used in the BiOp (i.e., "likely to result in significant adverse effects throughout the species' range") does not track the statutory language exactly, we note that FWS was writing in general terms and not necessarily defining the conclusive test for a finding of adverse effects on critical habitat. *See* 1997 BiOp at 42 (adverse effects "generally" do not result unless * * *).

The salient point here is that FWS engaged in a detailed analysis of the southwestern willow flycatcher and its critical habitat, as required by the ESA. *See* 1997 BiOp at 9-28, 33-34, 40-42. FWS may not have precisely quantified the reduction in a habitat's capacity to support a species that it would consider an "appreciable" reduction, as the Nation contends, but FWS did state, among other things:

> The frequency and magnitude of pollutants discharged into this critical habitat will modify the area from natural runoff to low density urban runoff. While the

> stormwater plan will reduce the amount of suspended solids (TSS), other parameters nitrite/nitrate and oil and grease are expected to increase. These parameters while singularly high are considered a fraction of the total flow through the area. Nonetheless, discharges from this project are expected to meet all Arizona Water Quality standards including the narrative standard which states "[Navigable] waters shall be free from oil, grease and other pollutants that float as debris, foam, or scum; or that cause a film or iridescent appearance [on] the surface of the water, or that cause a deposit on a shoreline, bank or aquatic vegetation" (ADEQ 1996b).
>
> Based on the magnitude of effects to the critical habitat for the southwestern willow flycatcher including the Verde River, Peck's Lake, and Tavasci Marsh from the proposed [NPDES permitting] action, such an action is not likely to destroy or adversely modify the proposed critical habitat.

1997 BiOp at 42. As the Region argues, the Nation has not identified any new information on potential impacts to the flycatcher or its habitat that FWS did not consider in its analysis. *See* R9 Resp. at 35. We therefore find no clear error or other reason to grant review of Region IX's reliance on the 1997 BiOp regarding the southwestern willow flycatcher and its critical habitat. Review on this ground is denied.

iii. *Cumulative Impacts*

Next, the Nation asserts that the 1997 BiOp "does not adequately describe the cumulative impacts to the species of concern." Pet'n at 32. "In particular," the Nation continues, "the contribution of the project to the cumulative impact on southwestern willow flycatcher habitat has been grossly underestimated." *Id*.

"Cumulative effects" are defined in the ESA regulations as effects of future nonfederal activities (i.e., state, local, and private

actions) that are "reasonably certain to occur within the action area of the [f]ederal action subject to consultation." 50 C.F.R. § 402.02. Cumulative effects must be considered by FWS, along with the effects of the action, in the course of preparing a BiOp. 50 C.F.R. § 402.14(g)(3)-(4). In this case, FWS did analyze the cumulative effects that might occur in the action area for the NPDES permit. *See* 1997 BiOp at 43-44; *cf. id*. at 35-43, 48-49 (discussion of direct and indirect effects on species of concern). In that analysis, FWS expressed uncertainty about a number of cumulative effects-related factors. *See id*. at 43 ("[i]t is not known if the lowering of the water table [from pumping out contaminated groundwater from underneath the tailings pile] will affect the immediate riparian ecosystem"; "[t]he magnitude of [additional river uses, development, and water diversions caused by Verde Valley urbanization] is not clear at this time"). Despite these uncertainties, FWS concluded on the basis of the information before it that EPA's permitting action was, among other things, not likely to destroy or adversely modify critical habitat for the endangered southwestern willow flycatcher or other species. *Id*. at 44.

The Yavapai-Apache Nation has not identified any new information about cumulative impacts that FWS did not take into account in its analysis. Thus, the Nation has failed to show any clear error in the Region's reliance on FWS's cumulative impacts analysis. *See Pyramid Lake Paiute Nation v. Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990); *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984), *cert. denied sub nom. Yamasaki v. Stop H-3 Ass'n*, 471 U.S. 1108 (1985). Review therefore must be denied on this ground.

iv. *Razorback Sucker Impacts*

The Nation argues next that "[f]ifteen years of results derived from the implementation of the recovery program for the razorback sucker[] have provided data suggesting that the Verde River is the best hope for recovery of the species in Arizona." Pet'n at 32. The Nation does not point to a document or other source of material in the administrative record that might elucidate these fifteen years of results. However, the Nation implies that Region IX did not take the results into

consideration in analyzing biological impacts on the razorback sucker, stating, "The potential project impacts to [the] razorback sucker have not been adequately analyzed." *Id*.

In fact, FWS analyzed the direct, indirect, and cumulative effects of the NPDES permit on the razorback sucker. *See* 1997 BiOp at 34-35, 42-44. It appears possible, and even likely, that FWS considered the information the Nation references as part of the section 7 consultation with Region IX. *See id*. at 34 (discussing 1980 memorandum of agreement between FWS and Arizona Game and Fish Department to stock razorback suckers in the Verde and other rivers and noting, "The stocking program and its results were recently reviewed (Hendrickson 1993)."). Short of being directed, with adequate specificity, to new information FWS failed to consider in its analysis, we cannot find clear error in Region IX's reliance on the 1997 BiOp provisions regarding the razorback sucker. *See*, *e.g.*, *In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & 99-5, slip op. at 103-04 (EAB June 22, 2000), 9 E.A.D. ___ (absent sufficient specificity as to why permit issuer's decision was erroneous, Board has no basis on which to grant review); *In re P.R. Elec. Power Auth.*, 6 E.A.D. 253, 255-59 (EAB 1995) (same); *In re Broward County*, 4 E.A.D. 705, 709 (EAB 1993) (disputed issues must be stated with specificity in order to support a petition for review). Review is denied.

v. *Underground Water Pumping Effects*

Next, the Nation contends the agencies failed to analyze the potential effects that underground water pumping will have on riparian habitat. Pet'n at 32. The Nation points out that tailings pile remediation will include dewatering the tailings basin to a depth of nine feet. The Nation contends, "It is assumed, not demonstrated, that this basin is an isolated feature and that dewatering the basin will have no effect on the surrounding water table. This hypothesis is deserving of a true analysis, because lowering the water table could result in significant impacts to riparian habitat." *Id*. at 32-33.

In response, Region IX points out that FWS and Region IX did, in fact, consider the effects of underground water pumping during their section 7 consultation on the NPDES permit. R9 Resp. at 36-37. Much of the agencies' analysis in this regard relied on hydrogeologic studies conducted pursuant to the Arizona Aquifer Protection Permits issued for the project. For example, in the 1997 BiOp, FWS states:

> The State of Arizona's Aquifer Protection Permit for this project was issued in conjunction with the reclamation of the tailings impoundment adjacent to Peck's Lake with the following conditions, which will be implemented with this project and are considered part of the baseline information. The following conditions are required with the permit: 1. cease discharging effluent from municipal Clarkdale Wastewater treatment plant to the tailings pile and build a new treatment plant; 2. cap and underdrain the tailings pile; 3. construct a soil-bentonite slurry wall between Peck's Lake and the pile; and 4. operate a groundwater pumpback system to stop the seepage of contaminated groundwater currently discharging into the Verde River.

1997 BiOp at 31-32; *see also* RTC ¶¶ 2.1-.23, 11.4-.7, 15.1, at 2-7, 18-20, 22 (responding to comments on tailings remediation plan and water quality/quantity issues). As mentioned in Part II.B.3.a.iii above, FWS acknowledges later in the BiOp that "[i]t is not known if the lowering of the water table will affect the immediate riparian ecosystem." 1997 BiOp at 43. However, in the incidental take statement established for the willow flycatcher, FWS observes, "Take of the southwestern willow flycatcher will result from degraded watershed conditions and riparian health and will likely occur over time. Groundwater pumping and pollutant discharges may limit existing and future willow flycatcher habitat." *Id*. at 45.

In light of these and other statements in the 1997 BiOp and Region IX's response to comments, it is plain that the agencies did in fact consider the potential effects to listed species and critical habitat that

groundwater pumping from the shallow aquifer might cause. As evidenced by the flycatcher incidental take statement quotation above, the agencies did not assume that there would be no effects whatsoever to riparian habitat or that the basin is an "isolated feature" unconnected to the ecosystem around it. While the FWS's express admission of uncertainty is a clear indication that more studies could be conducted with perhaps some benefit, uncertainty in analysis does not necessarily equate to inadequacy of analysis, as the Nation argues. *See Pyramid Lake*, 898 F.2d at 1415-16 (weak data are not necessarily evidence of agency failure to comply with substantive requirements of ESA); *Stop H-3*, 740 F.2d at 1460 (same). In point of fact, the agencies are tasked with a regulatory requirement to use the "best scientific and commercial data available,"[30] 50 C.F.R. § 402.14(d), (g)(8), but the Nation has not made an argument that the data relied upon here do not meet this standard. Moreover, the Nation does not identify any new information on riparian habitat impacts caused by pumping that FWS and Region IX failed to consider. Accordingly, we are unable to find clear error or any other reason to grant review of Region IX's treatment of this issue, and review is therefore denied on this ground.

vi. *Revised Permit Terms and Conditions*

The Yavapai-Apache Nation next contends that Region IX and FWS should justify in detail why the terms and conditions in the final 1997 BiOp differ from those set forth in the draft of that BiOp. Pet'n at 33. According to the Nation:

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[30]The term "best scientific and commercial data available" is not defined in either the statute or the section 7 regulations. Courts have held, however, that agencies generally meet the "best available data" test if they initiate feasible and necessary tests and studies and, once such tests and studies are initiated, do not act prematurely before the results are known. *See*, *e.g.*, *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (9th Cir. 1985); *Stop H-3*, 740 F.2d at 1460; *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1052 (1st Cir. 1984); *Vill. of False Pass v. Watt*, 565 F. Supp. 1123, 1154 (D. Alaska 1983), *aff'd sub nom. Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984); *Conservation Law Found. v. Watt*, 560 F. Supp. 561, 572 (D. Mass.), *aff'd sub nom. Mass. v. Watt*, 716 F.2d 946 (1st Cir. 1983).

> The draft [BiOp] contained several terms and conditions [that] implement the reasonable and prudent measures described as "necessary and appropriate to minimize take." These terms and conditions relate primarily to water quality issues, and were substantially downgraded in the final [BiOp]. EPA and USFWS should justify in detail why these terms and conditions were "necessary and appropriate" as well as "reasonable and prudent" in June, but not at the date of the final [BiOp] to achieve an ESA Section 7(o)(2) exemption.

Pet'n at 33.

In response, the Region explains that the terms and conditions were "modified from the draft to the final [BiOp] in the course of consultation as a result of discussions and correspondence" between Phelps Dodge, Region IX, and FWS "regarding the feasibility and appropriateness of the conditions." R9 Resp. at 38. As evidence of these EPA/FWS/permit applicant discussions, the Region cites the 1997 BiOp, which states that FWS received comments on the draft BiOp from Region IX, Phelps Dodge, and two consulting firms (SWCA and Woodward-Clyde) and the law firm of Gallagher & Kennedy (on behalf of Phelps Dodge), and that "[a]dditional conference calls, review drafts, and meetings occurred with the goal of finalizing" the BiOp. 1997 BiOp at 3 (cited in R9 Resp. at 38). The Region also cites an EPA letter to FWS that lists modifications to the draft BiOp proposed, for FWS's consideration, by Region IX and Phelps Dodge. Resp. Ex. 21 (Letter from Elizabeth Borowiec, Environmental Planner, EPA Region IX, to Debra Bills, FWS (Sept. 3, 1997)) (cited in R9 Resp. at 38). The letter explains, among other things, that EPA and Phelps Dodge were suggesting revisions to the incidental take statement because:

> The draft [BiOp] defines an exceedance of an incidental take as occurring when watershed conditions at the site are degraded below 1997 levels. EPA and Phelps Dodge believe that this may not be an appropriate definition of an exceedance of an incidental

> take since only a year of monitoring data is available. This level of data may not be enough to adequately characterize conditions in Peck's Lake. It is also unlikely to assume that the water quality in the lake would remain the same after the initiation of construction at the site. The amount of certain pollutants may rise or fall as a result of the change in land use.

Resp. Ex. 21 at 1.

While these fragments from the record give us only a partial picture of what transpired in the journey from draft to final BiOp, we are not concerned by the lack of further expository information on this topic. In its petition for review, the Nation does not identify the legal predicate for its conclusion that FWS or EPA must "justify in detail" the changes made between the draft and final BiOps, and we are not aware of any requirement in the ESA or its implementing regulations that contemplates the level of detail upon which the Nation insists. It appears that, by all accounts, FWS was satisfied that the terms and conditions specified in the final BiOp would ensure adequate protection for listed species. *See* 1997 BiOp at 46 (nondiscretionary terms and conditions in BiOp implement reasonable and prudent measures that are "necessary and appropriate to minimize take for the bald eagle, razorback sucker, and southwestern willow flycatcher"). The Nation has not pointed to any new information not considered by FWS that would challenge the adequacy of FWS's conclusion that the terms and conditions in the final BiOp were appropriate. Accordingly, we have no reason to believe Region IX clearly erred in its handling of this issue or that any other reason exists to grant review of the Region's reliance on FWS's 1997 BiOp. Review is denied.

vii. *Runoff Impacts and Sediment Disturbance*

The Yavapai-Apache Nation's final challenge to the 1997 BiOp is that the BiOp fails to adequately analyze the general impacts of storm water runoff into receiving waters and potential disturbance of sediments

containing heavy metals and other toxic substances. Pet'n at 33. According to the Nation, most of these analyses have been deferred until a later date. As a consequence, the Nation claims, the 1997 BiOp's incidental take statement is deficient because it is based on "an unsubstantiated collection of guesses." *Id*. In addition, the Nation argues that direct measurements of project impacts to listed species should be designed and implemented because the indirect means specified in the BiOp are unlikely to provide any "meaningful feedback that will allow USFWS to quantify take." *Id*.

As mentioned above, the 1997 BiOp contains an analysis of the storm water permit's direct, indirect, and cumulative impacts on protected species and habitat. *See* 1997 BiOp at 35-44. The agencies relied on this analysis to establish incidental take requirements for affected species. *See* Permit cond. I.E (Phelps Dodge must comply with reasonable and prudent measure included in BiOps, as well as nondiscretionary terms and conditions that implement the reasonable and prudent measure, "in order to minimize the impact of incidental take on threatened and endangered species"); 1997 BiOp at 44-47. The Yavapai-Apache Nation does not identify any new information that FWS and EPA did not consider during their consultation that would tend to show clear error in the conclusions and requirements pertaining to incidental take of listed species. Accordingly, review is denied.

b. *1999 Biological Opinion*

i. *Adequacy of Yuma Clapper Rail BA*

The Yavapai-Apache Nation also contends that the 1999 BiOp on the Yuma clapper rail is "flawed and invalid" because it is based on an inadequate BA prepared for Phelps Dodge by SWCA, Inc. Environmental Consultants in 1998. Pet'n at 34. The Nation states that "[i]n general, the BA is well researched and well reasoned. However, portions of the BA contain information and conclusions that are speculative, unsubstantiated, and sometimes contradictory." *Id*. In particular, the Nation argues that the 1998 BA: (1) improperly characterizes the semi-isolation of the project site as reducing, rather than

increasing, the value and importance of the site for the clapper rail; (2) is not sufficiently conservative in assessing the risks posed to clapper rails by pesticides, heavy metals, and hydrocarbons, given the uncertainty of the data on these topics; (3) "dangerously underestimate[s]" the impacts domestic and feral pets will have on the clapper rail; and (4) underestimates the impacts human recreation and other urbanization-related impacts will have on the rail. Pet'n at 34-37.

In analyzing biological issues and preparing the 1999 Yuma clapper rail BiOp, FWS was required to review "all relevant information provided by the [f]ederal [action] agency or otherwise available," and then conduct its own evaluation and formulate an opinion regarding the action. 50 C.F.R. § 402.14(g)(1)-(4). In this instance, FWS did just that, stating:

> This biological opinion is based on information provided in the April 1998 Addendum to the [BA] for the Verde Valley Ranch prepared by SWCA, Inc., the files and information gathered in the original [BiOp], telephone conversations between members of our staff, field investigations, and other sources of information.

1999 BiOp at 1. Thus, as Region IX argues, "even if one were to assume that the 1998 BA was deficient in its analyses and conclusions, a deficiency in the BA would not itself render the 1999 BiOp legally inadequate, because the analyses conducted and conclusions drawn in the 1999 BiOp were not based solely on the 1998 BA." R9 Resp. at 40. Moreover, the 1999 BiOp includes detailed information and analyses about the effects of the federal action on the clapper rail; the Nation does not point to any conclusions or findings in the BiOp itself that it alleges are incorrect, nor does it identify any new information that was not factored into the BiOp's conclusions. Thus, Region IX's reliance on the 1999 BiOp to meet its substantive ESA obligations was not clear error.

ii. *Permit Conditions*

The Yavapai-Apache Nation also asserts that the NPDES permit conditions will not adequately protect listed species and designated habitats because they are (1) "strongly weighted toward monitoring, which is only the first necessary component of an effective mitigation program"; (2) "do not prescribe effective mitigations in the event that potentially significant impacts are observed or permit thresholds are exceeded"; and (3) "do not include contingency plans in case the mitigation measures prove ineffective." Pet'n at 38. The Nation further contends:

> In some cases, the permit describes the best-case-scenario conditions under which monitoring can be decreased, whereas the permit is largely silent on mitigations that should be implemented when permit conditions are violated in the future. Worse, thresholds that would constitute permit violations are poorly defined or undefined. By deferring the development and critical review of such mitigation plans to that point in time where the monitoring program indicates a permit violation, EPA has not met its responsibility to the public.

Id. at 39.

Region IX responded to comments along this line in the documentation for the final permit. In so doing, the Region noted that the permit conditions provide a nondiscretionary series of steps Phelps Dodge must take in the event monitoring data indicate that storm water discharges from the Verde Valley Ranch are causing or contributing to a violation of water quality standards. RTC ¶¶ 11.5-.7, at 18-20; *see* Permit cond. I.E, at 5. For example, within sixty days of an adverse monitoring indicator, Phelps Dodge must initiate an investigation to determine the source of the water quality violation. Permit cond. I.E, at 5. Before the next reporting period for the affected parameter, Phelps Dodge must implement any necessary modifications to the storm water

management program. *Id*. Phelps Dodge also is required to initiate plans for additional modifications to the storm water management program if earlier modifications fail to correct the violation or if repeated violations occur within one year. *Id*. As for the Yuma clapper rail, the Region explained in its response to comments that Phelps Dodge must, in coordination with FWS and the Arizona Game and Fish Department, develop and implement a crayfish tissue analysis study. RTC ¶ 10.7, at 16; *see* Permit cond. I.E.6. The draft study must be submitted to FWS within three months of the effective date of the NPDES permit and will evaluate both pre- and post-construction conditions, and sampling will begin as soon as possible after approval of the study. RTC ¶ 10.7, at 16; Permit cond. I.E.6.

In addition, Phelps Dodge observes that the storm water permit requires it to amend the SWPPP whenever "[i]nspections or investigations by the permittee, local, [s]tate or federal officials indicate the SWPPP is proving ineffective in eliminating or significantly minimizing discharges of pollutants." PD Resp. at 16 (citing Permit cond. C.2). Moreover, as Region IX notes, section 7 consultation must be reinitiated in cases where actual "take" of listed species exceeds projected incidental take or where other specified circumstances indicate additional consultation is necessary to ensure adequate protection. R9 Resp. at 42; *see* 50 C.F.R. § 402.16.

Thus, contrary to the Nation's contentions, the permit and the regulatory scheme together provide a number of mechanisms that ensure adverse environmental impacts on protected species and habitat are addressed in a timely fashion. The Nation has not identified any new information not considered by FWS in its 1997 and 1999 BiOps, and we are therefore unable to find any clear error or other reason to grant review of the NPDES permit on these grounds.

C. *National Historic Preservation Act*

As mentioned in Part I.B above, the Phelps Dodge parcel lies just to the northwest of Tuzigoot National Monument, prehistoric Indian ruins situated on highlands above the Verde River not far from the tailings pile.

Other prehistoric or historic Native American sites on or near the property include the Hatalacva Ruins and grave sites of the Yavapai-Apache Nation, which holds these sites to be sacred. *See* Pet'n at 4. In the 1980s, Phelps Dodge hired SWCA, Inc. Environmental Consultants ("SWCA") to conduct an archaeological survey of the Verde Valley Ranch property, which SWCA completed in February 1988. In November 1988, SWCA initiated data recovery efforts at five sites within the survey area and later prepared a report summarizing its findings. *See* Resp. Exs. 6, 7. "The report of those excavations states that 'a principal goal was to achieve voluntary compliance * * *' with preservation laws because of the possibility that these laws might 'come to bear in a formal context at a later stage in the development process.'" Resp. Ex. 6 (Letter from Carol Heathington, Compliance Specialist, State Historic Preservation Office, to Elizabeth Borowiec, EPA Region IX (Mar. 23, 1998)) (quoting SWCA's data recovery report).

In this appeal, the Yavapai-Apache Nation claims that Region IX failed to comply with section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 to 470x-6, in issuing the Verde Valley Ranch storm water permit to Phelps Dodge. Pet'n at 39-40. Section 106 requires federal agencies to "take into account" the effects of their "undertakings" on historic properties that are eligible for or listed in the National Register of Historic Places.[31] NHPA § 106, 16 U.S.C. § 470f; *see* 40 C.F.R. § 122.49(b) (NHPA procedures must be followed when issuing NPDES permit). This is done by means of the section 106 consultation process, set forth in regulations promulgated by the Advisory Council on Historic Preservation ("ACHP"), a federal agency established by the NHPA to carry out the requirements of the statute. *See* 16 U.S.C. §§ 470i to 470v-1. The section 106 process begins when a federal agency determines that one of its activities, such as the issuance of a federal permit, qualifies as an NHPA "undertaking." *See* 16 U.S.C. § 470w(7) (definition of "undertaking"). The undertaking's "area of

[31]The National Register is a list of "districts, sites, buildings, structures, and objects" that are "significant in American history, architecture, archaeology, engineering, and culture." 16 U.S.C. § 470a(a)(1)(A). The procedure and criteria for selecting properties for inclusion in the National Register are set forth at 36 C.F.R. pts. 60, 63.

potential effects" ("APE") then establishes the scope of NHPA review for the undertaking. *See* 36 C.F.R. § 800.2(c) (1998) (definition of "APE"); 64 Fed. Reg. 27,044, 27,083 (May 18, 1999) (codified at 36 C.F.R. § 800.16(d) (2000)) (revised definition of "APE")); 65 Fed. Reg. 77,698, 77,738 (Dec. 12, 2000) (codified at 36 C.F.R. § 800.16(d) (2001)) (same). Once the undertaking and APE are defined, the federal agency will engage in consultation with the State Historic Preservation Officer ("SHPO") and possibly other parties to, among other things, devise means to avoid, minimize, or mitigate any adverse effects the undertaking might have on National Register-listed or -eligible resources within the APE. *See* 36 C.F.R. pt. 800 (1998); 64 Fed. Reg. 27,044 (May 18, 1999) (codified at 36 C.F.R. pt. 800 (2000)) (revised consultation process); 65 Fed. Reg. 77,698 (Dec. 12, 2000) (codified at 36 C.F.R. pt. 800 (2001)) (same).

Under the NHPA regulations in effect from the mid-1980s to mid-1999, the prescribed consultation process required the federal agency and the SHPO, as consulting parties, to provide a Native American tribe with an opportunity to participate in the consultation as an "interested person" if, as here, the federal undertaking could potentially affect properties of historic value to the tribe on nontribal lands.[32] 51 Fed. Reg. 31,115, 31,119 (Sept. 2, 1986) (codified at 36 C.F.R. § 800.1(c)(2)(iii) (1998)). The federal agency and the SHPO were further required to invite the Native American tribe to participate as a consulting party, rather than simply as an interested party, if the tribe so requested.[33] *Id*. at 31,121 (codified at 36 C.F.R. § 800.5(e)(1)(ii) (1998)). However, under recently revised regulations that reflect Congress' desire (made

[32]The regulations also specified that "[w]hen an undertaking will affect Indian lands, the Agency Official shall invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement." 51 Fed. Reg. 31,115, 31,119 (Sept. 2, 1986) (codified at 36 C.F.R. § 800.1(c)(2)(iii) (1998)).

[33]Consulting parties play a primary role in discussing adverse effects, possible mitigation measures, and other matters, whereas interested parties play a less prominent role, providing their views on various topics for consideration by the consulting parties. *See* 36 C.F.R. §§ 800.1(c), .5(a) (1998).

manifest in 1992 amendments to NHPA) to ensure Native American participation in certain section 106 processes, consultation on historic properties of cultural or religious significance to Native American tribes -- regardless of whether on tribal or nontribal lands -- must include those tribes as consulting parties.[34] *See* 64 Fed. Reg. at 27,072 (codified at 36 C.F.R. § 800.2(c)(3) (2000)); *see also* 16 U.S.C. § 470a(d)(6)(B) (in carrying out its NHPA section 106 responsibilities, a federal agency "shall consult with any Indian tribe or Native Hawaiian organization that

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[34]To incorporate the 1992 NHPA amendments into the existing section 106 regulations, the ACHP issued proposed revisions to the regulations in 1994 and 1996 and revised final regulations on May 18, 1999. *See* 64 Fed. Reg. 27,044 (May 18, 1999) (final rule); 61 Fed. Reg. 48,580 (Sept. 13, 1996) (proposed rule); 59 Fed. Reg. 50,396 (Oct. 3, 1994) (proposed rule). The final regulations took effect on June 17, 1999, approximately eighteen months prior to the issuance, on January 3, 2001, of Phelps Dodge's storm water permit.

In the interim, on February 15, 2000, a lawsuit challenging the new regulations was filed in federal court. During the pendency of the lawsuit, the ACHP reissued the new final regulations in proposed form, solicited comments thereon, and issued revised final regulations that took effect on January 11, 2001. *See* 65 Fed. Reg. 77,698 (Dec. 12, 2000) (final rule); 65 Fed. Reg. 42,834 (July 11, 2000) (proposed rule); *see also* 65 Fed. Reg. 55,928 (Sept. 15, 2000) (notice of proposed suspension of rule and adoption as guidelines); *Nat'l Mining Ass'n v. Slater*, 167 F. Supp. 2d 265, 273 (D.D.C. 2001) (recounting regulatory history).

The ACHP's various *Federal Register* notices are silent on the question of which version of the regulations should be applied to cases in progress, such as the one before us today. However, the ACHP issued some informal guidance on this question, which states:

> Cases in progress generally should follow the revised regulations. However, the consulting parties, who began consultation before the effective date of the new regulations, may agree to complete the process under the former regulations. Such agreement should be in writing and should state the reasons for the decision.

ACHP, *Section 106 Regulations: Transition Questions & Answers*, *available at* http://www.achp.gov/regsq&a.html (last updated Feb. 7, 2001). Notably, the administrative record in this case does not appear to contain documentation of any discussions or decisions made as to which NHPA section 106 regulations should be applied to the Verde Valley Ranch NPDES permit.

attaches religious and cultural significance" to properties listed in or eligible for listing in the National Register of Historic Places); 65 Fed. Reg. at 77,726-27 (codified at 36 C.F.R. § 800.2(c)(2) (2001)). Section 106 consultations typically culminate in a memorandum of agreement between the federal agency, SHPO, and sometimes other parties, and the federal agency authorizing the undertaking is tasked with ensuring that the undertaking proceeds in accordance with the terms of that agreement. *See* 36 C.F.R. § 800.6(c) (1998); 64 Fed. Reg. at 27,076-77 (codified at 36 C.F.R. § 800.6(c) (2000)); 65 Fed. Reg. at 77,731 (codified at 36 C.F.R. § 800.6(c) (2001)).

In this case, the Nation claims that the administrative record does not reflect that EPA, the Army Corps of Engineers, or any other federal agency ever initiated the section 106 process for the proposed project. Pet'n at 40. Alternatively, the Nation argues that if the section 106 process was initiated, it was not properly implemented, because the Nation and other parties with interests in the process were not informed that the process was underway. *Id*. The Nation fears that the Tuzigoot National Monument and the Hatalacva Ruins, which are Sinaugha Culture sites that date from A.D. 1100 to A.D. 1400, will not be adequately protected from the potential impacts of the proposed project. *Id*. The Nation states, "[T]hese two regionally significant sites are subject to indirect impacts of the project, which will dramatically affect the surrounding context and perhaps detract from the interpretability of the sites and the aesthetic experience of visitors." *Id*.

The Region contradicts the Nation's assertion that it was not informed of the section 106 process, pointing out that in 1994, the Corps consulted with the Arizona SHPO regarding potential impacts of the Corps' undertaking (i.e., the issuance of wetlands permits for the Verde Valley Ranch) on historic resources within the APE of that undertaking. R9 Resp. at 15. The Region asserts that during the consultation, the SHPO agreed that the Corps' undertaking "would have *no adverse effect* on Hatalacva or any other National Register eligible property, based on development and implementation of a management plan to protect Hatalacva." Resp. Ex. 6, *quoted in* R9 Resp. at 15-16. The Region identifies a December 4, 1996 letter from the SHPO to the

Archaeological Conservancy, which had acquired the Hatalacva property, as providing proof that the Yavapai-Apache Nation was "specifically included" in the section 106 consultation for the wetlands permits. R9 Resp. at 16. That letter states, "We are satisfied with the draft [management] plan [for Hatalacva], although we understand that further revisions may be needed based on comments requested from the Hopi, Yavapai, and Yavapai-Apache tribes and the Pueblo of Zuni."[35] Resp. Ex. 10 (Letter from Carol Heathington, Compliance Specialist, State Historic Preservation Office, to James B. Walker, Southwest Regional Director, Archaeological Conservancy (Dec. 4, 1996)).[36]

As for the storm water permit at issue in this appeal, the Region notes that on February 12, 1998, it sent a letter of inquiry to the Arizona SHPO requesting confirmation that "no additional consultation with your office is necessary for EPA's NPDES storm water permit, since the site is consistent with the property reviewed [by SWCA] in 1988." Resp. Ex. 9. On March 23, 1998, the SHPO responded, stating, "[W]e agree with EPA that no additional consultation pursuant to the NHPA is warranted, provided that the area of potential effect for EPA permitted actions is the same as that covered by our consultation with the [Corps of Engineers]." Resp. Ex. 6. In its brief, Region IX asserts that because "the area of potential effect is the same as that covered by the earlier [Corps of Engineers] consultation, the record clearly demonstrates * * * that the

[35]According to Phelps Dodge's NHPA consultant, "[t]o ensure long-term protection of Hatalacva, Phelps Dodge negotiated with the Archaeological Conservancy to acquire and manage the site. In 1996, the Archaeological Conservancy acquired the site, sent the preservation plan to Yavapai Apache, Zuni, and Hopi tribes for comment, and began implementation of the revised preservation plan including fencing and other measures." Resp. Ex. 7 (Letter from John R. Thomas, SWCA, Inc., to Elizabeth Borowiec, EPA Region IX (Feb. 9, 1998)).

[36]The Region does not identify any comments on the Hatalacva management plan ultimately submitted by the Yavapai-Apache Nation or other tribes.

Verde Valley Ranch project * * * was, in fact, subjected to full consideration under Section 106 of the NHPA."[37] R9 Resp. at 16-17.

In its response to comments on the draft storm water permit, the Region stated that the Yavapai-Apache Nation was informed of EPA's activities to comply with the NHPA, provided with the 1988 study documenting the excavation of five archaeological sites on the Phelps Dodge parcel, and afforded "ample opportunity to comment on the results of the study." RTC ¶ 14.2, at 21. Notably, the Nation does not advance any argument on appeal specifically rebutting these assertions. Instead, the Nation simply claims, in a nearly verbatim repetition of its comments on the draft permit, that the section 106 process was never initiated or, if it was initiated, that it was not properly implemented because the Nation was excluded from the process. *Compare* Pet'n at 40 *with* Pet'r Ex. B at 10 (Nation's comments on draft permit).

The unrebutted record before us indicates that the Yavapai-Apache Nation was furnished with the 1988 data recovery study and provided an opportunity to comment thereon, and that the Archaeological Conservancy solicited the Nation's comments on the draft Hatalacva management plan. *See* RTC ¶ 14.2, at 21; Resp. Exs. 7, 10. While it is theoretically possible that there may have been procedural irregularities in this process, particularly in view of the changes in the NHPA regulations enhancing the role of Native American tribes in section 106 consultations,[38] we have not been presented with a specific legal

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[37]Interestingly, we have neither found nor been directed to the portions of the record where the wetlands and storm water permits' APE determinations are documented or where the SHPO ultimately concurred (assuming it did) that the two APEs are identical.

[38]The May 18, 1999 revised regulations (*see supra* note 34), which took effect on June 17, 1999, arguably should have been applied to this permit. *See* 40 C.F.R. § 122.43(a), (b)(1) (permit conditions must assure compliance with all "applicable requirements" of CWA and regulations; "applicable requirements" include all statutory and regulatory requirements that take effect prior to the issuance of an NPDES permit and may also include, at permit issuer's discretion, important new requirements that (continued...)

argument to that effect, and the record lacks adequate information for us to draw such a conclusion on our own.[39] For example, the Nation does not attempt to rebut Region IX's statement in the response to comments that the Nation's input was solicited during NHPA consultation, nor does it challenge EPA's apparent conclusion that the APE for the storm water permit is identical to the APE for the wetlands permits. The Nation also does not contend that it asked to participate as a consulting party on the wetlands permits, in accordance with 36 C.F.R. § 800.5(e)(1)(ii) (1998), or that it was required to be a consulting party under the statute or the revised section 106 rules, *see* 16 U.S.C. § 470a(d)(6)(B);[40] 64 Fed. Reg. at 27,072 (codified at 36 C.F.R. § 800.2(c)(3) (2000)); 65 Fed. Reg. at 77,726-27 (codified at 36 C.F.R. § 800.2(c)(2) (2001), or give us any other sufficiently specific reason to grant review of the permit on NHPA grounds.

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[38](...continued)
become effective during permitting process); 40 C.F.R. § 122.49(b) (NPDES permits must contain conditions to ensure compliance with the NHPA and its implementing regulations). The 1999 regulations remained in effect, despite the February 2000 lawsuit challenging them, until the re-revised regulations superseded them on December 12, 2000, with an effective date of January 11, 2001.

[39]It is not our duty in an adversarial proceeding to comb the record and make a party's argument for it. *See*, *e.g.*, *U.S. Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185, 1191 (6th Cir. 1997) ("court is not required to search the record for some piece of evidence" that might make party's case for it); *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463-64 (5th Cir. 1996) (same); *Wilson v. Jotori Dredging, Inc.*, 999 F.2d 370, 372 (8th Cir. 1993) (appellate court is not required to search record for error); *In re Louisiana-Pacific Corp.*, 2 E.A.D. 800, 802 (CJO 1989) ("reviewing official is not required to engage in a search of the entire record to determine what, if anything, supports Respondent's objections; it would be improper for the reviewing official to do so, for Respondent would have its argument constructed for it").

[40]Neither the statute nor the legislative history for the 1992 NHPA amendments provide a definition for the word "consult." An argument could perhaps be made that Congress was familiar in 1992 with the meaning the ACHP had assigned "consult" or "consultation" in the section 106 regulations, and therefore that Congress implicitly approved of that definition by failing to define the term itself as part of the 1992 amendments. The Yavapai-Apache Nation has not raised such an argument, however, and thus we will not pursue it further.

We are mindful that one of the goals of the NHPA program is to ensure the voices of Native Americans are heard in section 106 activities. *See*, *e.g.*, 36 C.F.R. § 800.1(c)(2)(iii) (1998) ("[t]he Agency Official, [SHPO], and [ACHP] should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties"); 64 Fed. Reg. at 27,059 ("[t]he 1992 NHPA amendments place major emphasis on the role of Indian tribes and other Native Americans"); 64 Fed. Reg. at 27,072 (codified at 36 C.F.R. § 800.2(c)(3)(i) (2000)) (listing Native American tribe consultation requirements that must be fulfilled by federal agency); 65 Fed. Reg. at 77,726-27. In considering this issue, however, the Board must comply with EPA's regulations establishing procedures for the issuance, modification, and termination of NPDES permits. Under those regulations, petitioners are required to submit petitions for review that:

> (A) Demonstrate that any issues being raised were raised during the public comment period;[41] and
> (B) Show that the permit condition in question is based on:
> (1) A finding of fact or conclusion of law that is clearly erroneous; or
> (2) An exercise of discretion or an important policy consideration that the Board should, in its discretion, review.

40 C.F.R. § 124.19(a).

The intent of these rules is to ensure that the permitting authority -- here, Region IX -- has the first opportunity to address any objections to the permit, and that the permit process will have some finality. *See In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999) ("The effective, efficient, and predictable administration of the permitting

[41]Alternatively, a petitioner may demonstrate that an issue for which it seeks review was not "reasonably ascertainable" during the public comment period. *See* 40 C.F.R. § 124.13; *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 n.8 (EAB 1999).

process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final."). "'In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary.'" *In re Essex County (N.J.) Res. Recovery Facility*, 5 E.A.D. 218, 224 (EAB 1994) (quoting *In re Union County Res. Recovery Facility*, 3 E.A.D. 455, 456 (Adm'r 1990)); *see In re City of Phoenix, Squaw Peak & Deer Valley Water Treatment Plants*, NPDES Appeal No. 99-02, slip op. at 17-18 (EAB Nov. 1, 2000), 9 E.A.D. ___, *appeal docketed*, No. 01-70263 (9th Cir. Feb. 16, 2001). As EPA explained when it promulgated the part 124 rules, the Board's power of review "should be only sparingly exercised," and "most permit conditions should be finally determined at the [r]egional level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see In re Maui Elec. Co.*, 8 E.A.D. 1, 7 (EAB 1998).

In complying with these requirements, petitioners must include specific information supporting their allegations. It is not sufficient simply to repeat objections made during the comment period; instead, a petitioner "must demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous or otherwise warrants review." *In re LCP Chems.*, 4 E.A.D. 661, 664 (EAB 1993); *accord Encogen*, 8 E.A.D. at 251-60. The burden of demonstrating that review is warranted rests with the petitioner. *See* 40 C.F.R. § 124.19(a); *In re AES P.R. L.P.*, 8 E.A.D. 324, 328 (EAB 1999); *In re Haw. Elec. Co.*, 8 E.A.D. 66, 71 (EAB 1998).

In a case where, as here, a petitioner's challenge to a final permit merely duplicates the challenge it advanced in comments on the draft version of the permit, with no attempt made to contest the adequacy of the permit issuer's response to its comments, review is typically denied. *See*, *e.g.*, *In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & -5, slip op. at 89 (EAB June 22, 2000), 9 E.A.D. ___ ("[w]e have repeatedly held that where petitions merely restate previously submitted comments without indicating why the permit agency's responses thereto were clearly erroneous or otherwise warranted review, review will be denied");

In re Town of Ashland Wastewater Treatment Facility, NPDES Appeal No. 00-15, slip op. at 14 (EAB Feb. 23, 2001), 10 E.A.D. ___; *LCP Chems.*, 4 E.A.D. at 664. Here, the Nation failed to fulfill the requirement, set forth in 40 C.F.R. § 124.19(a), that a petitioner identify clear error in the permit issuer's legal or factual analyses or other reason for the Board to grant review of the permit condition(s) at issue. Accordingly, review is denied on this ground.

D. *Federal Reserved Water Rights*

Next, the Yavapai-Apache Nation focuses on the quantity and quality of Verde River water it is entitled to under the doctrine of "federal reserved water rights." This doctrine derives from a 1908 Supreme Court decision, *Winters v. United States*, 207 U.S. 564 (1908), in which the Court held that Congress' explicit establishment of a reservation as the "permanent home and abiding place" of several Native American tribes also reserved, by implication, the water rights necessary to achieve the purposes for which the reservation was created. *Id*. at 576-77 (lands set aside in May 1888 for Gros Ventre and Assiniboine Nations were arid and "practically valueless" without irrigation). The Court stated seven decades later:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves,

> encompassing water rights in navigable and nonnavigable streams.

Cappaert v. United States, 426 U.S. 128, 138 (1976); *see Shoshone-Bannock Nations v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995) ("[w]ith respect to reserved water rights on Indian reservations, these federally created rights belong to the Indians rather than to the United States, which holds them only as trustee"). The doctrine of federal reserved water rights is an exception to the general principle of federal deference to states' authority to allocate quantities of water within their boundaries. *See*, *e.g.*, CWA § 101(g), 33 U.S.C. § 1251(g) (CWA may not be used to affect state authority to allocate water); 43 U.S.C. § 383 (Reclamation Act of 1902 may not be used to interfere with state laws regarding control, appropriation, use, or distribution of water used in irrigation).

In this case, the Nation claims that its federal reserved water rights will be adversely affected by: (1) pumping of underground water for the Verde Valley Ranch's municipal supply; (2) pumping of "subflow" from the shallow alluvial aquifer for containment of tailings leachate; and (3) discharges of pollutants to Peck's Lake, Tavasci Marsh, and the Verde River authorized by the storm water permit. Pet'n at 18. According to the Nation, "[a]dverse impacts will occur both in the form of depletion in the quantity of Verde River flow and degradation in the quality of the river water." *Id*. We address these impacts separately below.

1. *Quantity of River Water*

The Nation's quantity-related arguments are two-fold, deriving from concerns about (1) pumping for municipal supply, and (2) pumping for tailings pile remediation.

a. *Underground Water Pumping for Municipal Supply*

With respect to the first argument, the Nation asserts that "[a]lthough no information on the scale or location of pumping [for municipal supply] is provided in the [NPDES] permit, it is presumed that

the underground water supply will be derived from the Verde Formation through new deep wells drilled near the development through the alluvial aquifer." Pet'n at 19. The Nation estimates that over 4,400 acre-feet of water will be needed each year to supply the proposed project's homes, commercial buildings, and golf course and contends that such water use will deplete both the surface and subsurface flows of the Verde River, thereby interfering with the Nation's federal reserved water rights and also contributing to the cumulative adverse impact increased water demands are purportedly having on the riparian ecosystem of the Verde Valley region. *Id*. at 19-20.

Notably, the rights of thousands of parties to the waters of the Gila River system and source, including waters within the Upper Salt, Verde, Upper and Lower Gila, Agua Fria, Upper Santa Cruz, and San Pedro watersheds, have been the subject of ongoing litigation in the Arizona state courts and in some instances the federal courts since 1974. *See*, *e.g.*, *Ariz. v. San Carlos Apache Nation of Ariz.*, 463 U.S. 545, 557-59 (1983); *In re Gen. Adjud. of All Rights to Use Water in the Gila River Sys. & Source*, 9 P.3d 1069 (Ariz. 2000), *cert. denied*, 533 U.S. 941 (2001); *In re Gen. Adjud. of All Rights to Use Water in the Gila River Sys. & Source*, 989 P.2d 739 (Ariz. 1999) ("*Gila River III*"), *cert. denied*, 530 U.S. 1250 (2000) (two petitions); *In re Gen. Adjud. of All Rights to Use Water in the Gila River Sys. & Source*, 857 P.2d 1236 (Ariz. 1993) ("*Gila River II*"); *In re Rights to the Use of the Gila River*, 830 P.2d 442 (Ariz. 1992) ("*Gila River I*"); *United States v. Superior Court*, 697 P.2d 658, 663-64 (Ariz. 1985). This "comprehensive general stream adjudication," as it is known under Arizona law, *see* Ariz. Rev. Stat. Ann. §§ 45-251(2), -252 (2001); *Gila III*, 989 P.2d at 414, has the potential to "alter the balance of political and economic power between Indians and non-Indians in Arizona and the West by recognizing Indian ownership of a significant portion of the West's most precious commodity -- water." E. Brendan Shane, *Water Rights and* Gila River III*: The* Winters *Doctrine Goes Underground*, 4 U. Denv. L. Rev. 397, 398 (Spring 2001).

Both the Yavapai-Apache Nation and Phelps Dodge are parties to this ongoing litigation.[42]

Clearly, the Board does not have jurisdiction to step into the breach and resolve the respective rights to Verde River water held by the Yavapai-Apache Nation and Phelps Dodge. In this proceeding under the part 124 rules, the Board's role is to evaluate the Region's compliance, in issuing the NPDES permit, with the federal CWA and implementing regulations. *See* 40 C.F.R. § 124.19 (Board is empowered to review permit conditions); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999) (permit review process "is not an open forum for consideration of every environmental aspect of a proposed project"). A person's right to particular quantities of water is not a matter arising under the CWA NPDES program, nor is it included in the list of auxiliary federal statutes with which NPDES permitting must comply. *See* 40 C.F.R. § 122.49 (list of federal laws). Rather, the federal courts have

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[42]In the view of some commentators, "decades will likely pass before the adjudication process produces final water allocations among private, state, and federal interest-holders." Shane, 4 U. Denv. L. Rev. at 415; *see* Reed D. Benson, *Can't Get No Satisfaction: Securing Water for Federal and Tribal Lands in the West*, 30 Envtl. L. Rep. 11,056, 11,059-60 (Nov. 2000) ("glacial pace" of water rights adjudications taken in numerous state court systems under McCarran Amendment and *Colorado River* decision (discussed below) "have severely disadvantaged efforts to secure sufficient water supplies for federal and tribal lands"); *see also* Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems, and Tribal Co-Management*, 20 J. Land Resources & Envtl. L. 185, 197 (2000) ("in many instances [tribal water rights have] languished while junior agricultural and other appropriations continue").

As a result, commentators have advocated that, among other things: (1) federal courts retain jurisdiction over reserved water rights claims; (2) public participation be introduced into the process of establishing reserved rights; (3) federal legislation be enacted to resolve water rights disputes; (4) negotiations be used to achieve settlement; (5) tribes be involved in co-managing the water resources or vested with authority to regulate water use on their reservations; (6) tribes be allowed to market their water rights; and (7) other means be found to put to rest, in a timely fashion, the diverse and contentious claims to western water resources. *See*, *e.g.*, Benson, 30 Envtl. L. Rep. at 11,059-60; Jane Marx et al., *Tribal Jurisdiction over Reservation Water Quality and Quantity*, 43 S.D. L. Rev. 315, 359-64 (1998); Goodman, 20 J. Land Resources & Envtl. L. at 207-21.

jurisdiction to hear suits brought by the United States and by Native Americans to adjudicate water rights disputes, 28 U.S.C. §§ 1345, 1362, as do state courts. *See* 43 U.S.C. § 666 ("McCarran Amendment" allows federal government to be joined as party to comprehensive stream adjudications in state courts); *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 809-13 (1976) (effect of McCarran Amendment "is to give consent to jurisdiction in the state courts concurrent with jurisdiction in the federal courts over controversies involving federal rights [(including Indian rights)] to the use of water"); *see also Ariz. v. San Carlos Apache Tribe*, 463 U.S. 545, 570-71 (1983) (noting that federal courts have "virtually unflagging obligation * * * to exercise the jurisdiction given them," but stressing unique character of water rights adjudications and holding possibility of duplicative litigation and confusion over disposition of property rights as reasons to allow dismissal of federal water rights suit in favor of concurrent state court suit); *United States v. Adair*, 187 F. Supp. 2d 1273, 1274 (D. Or. 2002) (noting retention of federal district court jurisdiction over reserved water rights of the Klamath Tribes, concurrent with state court jurisdiction over those rights). Short of congressional action, a negotiated settlement, or other short-circuiting means, that dispute must be left to the Arizona and federal courts to resolve.

In its reply brief, the Nation indicates that it recognizes this is the case. *See* Reply Br. at 11-12 (Nation does not seek under NEPA or CWA "to resolve water rights disputes or otherwise interfere with pending state water rights proceedings"). However, the Nation argues that although its federal reserved water rights have not as yet been adjudicated or quantified, the rights nonetheless exist, and thus Region IX must be required under NEPA and the NPDES permit to analyze the adverse environmental impacts of the entire Verde Valley Ranch project on the water quantity and quality of the Verde River. *Id*. at 12.

To the extent this argument rests on the authority of NEPA, we must deny review for the reasons set forth in Part II.A above.[43] Moreover, we note that the Nation's arguments on this point repeat, almost verbatim, those it submitted in its comments on the draft permit. *Compare* Pet'r Ex. B at 10-12 (Nation's comments) *with* Pet'n at 18-22. As mentioned in the foregoing NHPA section, we have observed that repetition of comments without explaining why the Region's prior response to those comments was deficient provides a ground for us to deny review because such repetition generally falls short of the requirement that a petitioner identify clear error in the permit issuer's actions or omissions. *See*, *e.g.*, *In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & -5, slip op. at 89 (EAB June 22, 2000), 9 E.A.D. ___; *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 251-60 (EAB 1999); *In re SEI Birchwood, Inc.*, 5 E.A.D. 25, 27 (EAB 1994).

This being said, upon consideration, it does not appear that the Nation's arguments fall neatly into this category. Here, in response to the Nation's comments about municipal supply pumping adversely affecting its federal reserved water rights, the Region claimed that EPA had addressed this issue in a May 28, 1997 letter to the Nation. *See* RTC ¶ 15.1, at 22. That letter, the Region asserted, explained that "extensive hydrogeologic studies" had been conducted pursuant to the Arizona

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[43]The Nation states:

> Since water supply is an essential part of the project, EPA should be required to identify all water sources for the project as required by NEPA, before approving construction of the project. The source of the water supply for the project, particularly in arid Arizona, is also a critical determinant of environmental impacts, which remain undisclosed.

Reply Br. at 12. While we are sympathetic to the Nation's concern that the source of water for the proposed project be disclosed prior to the initiation of construction, particularly given the contentious, three-decade-old, ongoing litigation over water rights to the Verde and other rivers in the vicinity of Clarkdale, our sympathies do not give us a legal basis upon which to grant review of the NPDES permit before us. As a legal matter, NEPA is not applicable to this permit, and we are aware of no other federal means by which the review sought by the Nation could be achieved.

aquifer protection permits issued for the project and that the studies concluded no impacts to water quantity in the Verde River should occur. *Id*. Our examination of the letter, however, reveals a focus on the pumping of the shallow aquifer for remediation of the tailings piles rather than on pumping for municipal supply. *See* Pet'r Ex. D at 1 (Letter from Alexis Strauss, Water Division, EPA Region IX, to Joe P. Sparks, Esq. (May 28, 1997)) ("[s]ince there is no loss of water to the river from the pumping of the shallow aquifer, no impacts to water quality or quantity would occur"). Thus, it appears that in relying on a letter addressing the aquifer permits, the Region's response to the Nation's municipal supply concerns may have been inadequate.

Any shortcoming in Region IX's response in this regard, however, is harmless. As the Region points out, the NPDES permit at issue in this proceeding does not require or authorize the pumping of ground water, R9 Resp. at 9; *see* Permit, and therefore the Board lacks jurisdiction to entertain arguments pertaining to such pumping. *See* 40 C.F.R. § 124.19(a) (Board has jurisdiction to review any condition of permit decision); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 161 (EAB 1999) ("Board's jurisdiction to review * * * permits extends to those issues directly relating to permit conditions that implement the federal * * * program"). Moreover, as mentioned above, the water rights dispute belongs in another forum, and NEPA is inapplicable to this NPDES permit. For these reasons, review is denied on this ground.

b. *Shallow Aquifer Pumping*

The second component of the Nation's challenge regarding adverse effects on Verde River water quantity revolves around the pumping of water from the shallow alluvial aquifer under the tailings pile. The Nation believes that the aquifer contains "subflow" whose pumping will deplete the Nation's federal reserved water rights. Pet'n at 23. In response, the Region notes that the pumping in question is authorized not by its permit, but rather by an aquifer protection permit issued by ADEQ. R9 Resp. at 9. The Region contends that because ground water pumping is a matter of Arizona law, the Board does not have authority to review this issue. *Id*. at 10-11 (citing cases).

The Region is correct. Under the regulations governing this proceeding, we have jurisdiction to decide challenges to NPDES permit conditions. *See* 40 C.F.R. § 124.19(a). We are not at liberty to resolve every environmental claim brought before us in a permit appeal but must restrict our review to conform to our regulatory mandate. *See*, *e.g.*, *Encogen*, slip op. at 19-21 (no jurisdiction to consider acid rain, noise, and water-related issues in Clean Air Act ("CAA") permitting context); *Knauf*, 8 E.A.D. at 161-72 (no jurisdiction in CAA permitting context to consider issues concerning use of landfill for waste disposal, emissions offsets, NEPA issues, opacity limits, and other issues). In this instance, we are asked to consider an activity that is authorized by a state permit, not the NPDES permit at issue in this appeal, and this we lack jurisdiction to do. As mentioned in the foregoing section, we also must deny review of this issue to the extent the arguments presented by the Nation depend on NEPA; as discussed in Part II.A above, that statute is inapplicable to the NPDES permit before us. Review is denied.

2. *Quality of River Water*

Finally, the Yavapai-Apache Nation argues that its federal reserved water rights guarantee it a quality of water "suitable for drinking and other purposes associated with homeland needs." Reply Br. at 10; *see* Pet'n at 25-29; Tr. at 27, 31. The Nation believes the storm water discharges authorized by the NPDES permit will adversely affect the water quality of Peck's Lake, Tavasci Marsh, and the Verde River, which supply it with water. Pet'n at 25-29. The Nation argues that the sand filter system proposed in the permit is inadequate, in terms of treatment efficiency and hydraulic capacity, to prevent these adverse impacts. For example, the Nation claims that only fifty-five percent of trace metals (and in many circumstances much less) will be successfully captured by the filter system. *See id*. at 28-29; Tr. at 24. The Nation also points out that the sand filter system has capacity to treat a maximum of a two-year, twenty-four-hour storm event, and thus in more extreme storm events pollutants will bypass the filters and flow directly into the waters of the United States. Pet'n at 28-29. Finally, the Nation asserts that other pollution prevention measures specified in the permit fall short of what is needed to protect water quality. *See id*. at 26-27.

The Nation appears particularly concerned about the concentration of arsenic in its water supply. The Nation claims Region IX erred in evaluating the adequacy of the proposed sand filter system because it allegedly did so using the three-decades-old national primary drinking water standard for arsenic of fifty parts per billion ("ppb"), rather than the new standard of ten ppb, which the Clinton Administration promulgated in January 2001 and the Bush Administration affirmed later that year.[44] Pet'n at 28; Reply Br. at 9-10; Tr. at 27; *see* 66 Fed. Reg. 6976 (Jan. 22, 2001) (notice of new arsenic standard); U.S. EPA, Headquarters Press Release, *EPA Announces Arsenic Standard for Drinking Water of 10 Parts per Billion* (Oct. 31, 2001), *available at* http://www.epa.gov/safewater/arsenic.html (notice affirming new standard). The Nation cites water quality data in the 1996 BA showing that arsenic in the Verde River is consistently in the range of eleven to twenty ppb. Reply Br. at 9; *see* 1996 BA app. D. This indicates, the Nation argues, that the Verde River "has no capacity available to assimilate any additional arsenic loadings resulting from the storm water discharge." Reply Br. at 10; *see* Tr. at 26. The Nation concludes that in light of its federal reserved water rights to a quality of water suitable for drinking and other purposes associated with homeland needs, EPA should have relied on federal drinking water standards -- rather than state water quality standards -- to establish appropriate water quality-based effluent limitations for discharges from Verde Valley Ranch. Reply Br. at 10; Tr. at 26-30.

Under the CWA, EPA may not issue an NPDES permit to a proposed discharger until the state in which the discharger is located certifies that the permit contains conditions necessary to assure

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[44]Public drinking water systems, defined at 42 U.S.C. § 300f(4), must comply with the new arsenic "maximum contaminant level" of 10 ppb by 2006. 66 Fed. Reg. 6976, 6992-93 (Jan. 22, 2001); U.S. EPA, Office of Water, EPA 815-F-01-010, *EPA to Implement 10 ppb Standard for Arsenic in Drinking Water* (Oct. 2001).

compliance with the state's water quality standards.[45] CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1); 40 C.F.R. §§ 124.53(a), .55(a)(2). Water quality standards, which are subject to EPA approval after promulgation by states, have three components: (1) one or more "designated uses" of each water body or water body segment (i.e., public water supply, agriculture, recreation); (2) water quality "criteria" expressed in numerical concentration levels and/or narrative statements specifying the amounts of various pollutants that may be present in the water without impairing designated uses; and (3) an antidegradation provision. CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10-.12.

The State of Arizona has established designated uses, narrative and numeric water quality criteria, and antidegradation rules for waters within state boundaries.[46] *See* Ariz. Admin. Code tit. 18, ch. 11 (2001) (ADEQ, Water Quality Standards). The most stringent water quality standard for arsenic currently in effect in Arizona (for "domestic water source" and "full/partial body contact" recreational uses) is 50 ppb. *See id*. art. 1, app. A, tbl. 1. Significantly, the Arizona Department of Environmental Quality issued a state water quality certification for the Verde Valley Ranch storm water permit, attesting that in its view, the permit, as amended with changes it proposed, conforms to the Arizona water quality standards, including those for arsenic. Letter from Karen L. Smith, Director, Water Quality Division, ADEQ, to Terry Oda, Manager, EPA Region IX (Dec. 21, 2000); *see* Permit at 1 & conds. I.A.3, I.F.16-.17 (incorporating ADEQ changes). Phelps Dodge is specifically required by the permit to comply with all applicable Arizona water quality standards in discharging storm water from the proposed project site. Permit cond. I.A.4.

The Yavapai-Apache Nation offers no support for its novel theory that drinking water standards set in accordance with the Safe

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[45]Alternatively, the state may choose to waive such certification. *See* CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1); 40 C.F.R. §§ 124.53(a).

[46]There are also several federal water quality standards that apply to Arizona waters but are not relevant to this appeal. *See* 40 C.F.R. § 131.31.

Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f to 300j-26, should have been used by Region IX to establish storm water pollution controls or limits for the Verde Valley Ranch. We are aware of nothing in federal statutes, regulations, or common law that would dictate this use of SDWA standards, and no such authority has been pointed out to us.[47] The foundation of the Nation's SDWA theory is in the nature of a challenge to Arizona's numerical water quality criteria or designated use standards -- e.g., the arsenic criteria for domestic water source uses should be ten ppb instead of fifty ppb, and/or the designated use of the Verde River near the Nation's Camp Verde Reservation should be revised to indicate drinking water use. *See* Tr. at 26-32. This, once again, is not the proper forum for such challenges. We are charged in this part 124 proceeding with reviewing permit conditions, not with

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[47]In the course of analyzing these issues, we have become familiar with cases in which Native American tribes have obtained "treatment as states" ("TAS") status under CWA § 518(e) and have proceeded to promulgate their own water quality standards, which may be more stringent than otherwise-applicable state water quality standards. *See generally Wis. v. EPA*, 266 F.3d 741 (7th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3562 (U.S. Feb. 25, 2002) (No. 01-1247); *Mont. v. EPA*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997). In such cases, the tribes have been held to have power to require upstream off-reservation discharges to comply with their water quality standards, just as states do with respect to discharges from upstream states. *See*, *e.g.*, *Wis. v. EPA*, 266 F.3d at 748-49. Notably, in the circumstance at hand, the Yavapai-Apache Nation has not obtained TAS status as of this time, nor to our knowledge has it promulgated its own water quality standards.

Moreover, as a federal court observed in a case involving a challenge to EPA approval of water quality standards set by a Native American tribe (the Pueblo of Isleta, which had TAS status):

> The federal drinking water standards apply only to a "public water system," which is defined as a system supplying piped water for human consumption serving at least twenty-five persons or having at least fifteen service connections. 42 U.S.C. § 300f(4). The Isleta Pueblo's ceremonial use standard [(which involved "immersion and intentional or incidental ingestion of water")] does not convert the Rio Grande River into a public water system.

City of Albuquerque, 97 F.3d at 427.

reviewing regulatory criteria that may bear on how those permit conditions are shaped. *See* 40 C.F.R. § 124.19(a) (persons may petition the Board to review any condition of a final NPDES permit decision); *see also In re B.J. Carney Indus.*, 7 E.A.D. 171, 194 (EAB 1997) ("there is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding * * * 'and a review of a regulation will not be granted absent the most compelling circumstances'") (quoting *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994)). Thus, we will not consider the Nation's SDWA argument further.

As to the other components of the Nation's argument, Region IX points out that the NPDES permit contains a variety of conditions that are designed to protect the water quality of Peck's Lake, Tavasci Marsh, and the Verde River. *See* R9 Resp. at 12. Those conditions, which the Region discussed in its response to comments on the draft permit, *see*, *e.g.*, RTC ¶¶ 3.1-.9, 9.1-.7, 11.5-.6, 24.6, at 7-9, 13-15, 18-20, 28, require Phelps Dodge to implement a variety of best management practices, comply at all times with Arizona water quality standards, upgrade existing pollution controls if water quality standards are exceeded, and implement an SWPPP that includes, among many other things, a 100-year storm event containment system for the tailings cap. *See*, *e.g.*, Permit conds. I.A.2, I.A.4, I.E, I.F.16, II.23, app. 1; SWPPP at 5-17. In addition, the Region notes that it designated the Verde Valley Ranch's post-construction storm water discharges as requiring a continuing NPDES permit, in accordance with the CWA provision authorizing such a permit requirement in cases where EPA determines a storm water discharge would constitute a "significant contributor of pollutants to waters of the United States." R9 Resp. at 14; *see* CWA § 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E); RTC ¶ 26.1-.12, at 31-34. Finally, the Region notes that EPA retains discretion to initiate enforcement actions where appropriate. R9 Resp. at 14; *see* Permit cond. II.3 (duty to comply provisions). Taken together, the Region argues, all these elements ensure storm water discharges will not adversely affect waters of the United States in the ways the Nation fears. R9 Resp. at 14.

EPA Region IX's arguments are persuasive. As the Agency correctly notes, in technical areas such as these involving the adequacy of sand filters and other water quality protection measures, we traditionally defer to the expertise of the Region in the absence of compelling evidence or argument to the contrary. *See*, *e.g.*, *In re City of Moscow*, NPDES Appeal No. 00-10, slip op. at 10-11 (EAB July 27, 2001), 10 E.A.D. ___; *In re Steel Dynamics, Inc.*, PSD Appeal No. 01-03, slip op. at 12, 18-19 (EAB Apr. 23, 2001), 9 E.A.D. ___; *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999). The evidence and argument advanced by the Nation with respect to water quality fall short of that mark. In several instances, the Nation merely repeats objections made during the comment period, when what is needed to gain its objective is identification of clear error committed by the Region in analyzing or addressing these issues. *Compare* Pet'n at 25-29 *with* Pet'r Ex. B at 13-15 (Nation comments on draft permit); *see* RTC at 5-9, 12-15, 18-21, 22 (Region IX's responses to water quality-related comments). For example, the 1996 BA, which contains data and analyses relied upon by the Region in issuing this permit, states that arsenic "has not been shown to increase with residential development," 1996 BA at 36, and the Nation has identified no evidence to the contrary. Moreover, the Nation presents arguments about federal reserved water rights without offering any legal authority for its contentions. Without more, we simply cannot accommodate the Nation's desire for a remand on the ground of alleged Region IX errors pertaining to water quality impacts.[48] *See City of Moscow*, slip op. at 31, 34-35, 42, 52-53, 10

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[48] In response to the Board's request for supplemental briefing on the interplay between CWA §§ 301 and 402(p), Region IX and Phelps Dodge point out that in the fact sheet summarizing the final NPDES permit, Region IX stated:

> [T]he SWPPP includes various BMPs to control pollutants in storm water discharges from the project. Appendix 1 to the permit adds a requirement for an ongoing program to detect and eliminate illicit non-storm discharges during the post-construction phase. *EPA believes that these requirements are appropriate for ensuring compliance with the technology-related pollutant control*

(continued...)

E.A.D. ___ (review of permit denied where petitioner failed to establish clear error on permit issuer's part); *In re New England Plating Co.*, NPDES Appeal No. 00-07, slip op. at 16-19 (EAB Mar. 29, 2001), 9 E.A.D. ___ ("petitioner must not only identify disputed issues but *demonstrate* the specific reasons why review is appropriate"). Review is denied.

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[48](...continued)
requirements of the Clean Water Act.

EPA Region IX, *Fact Sheet for Final NPDES Storm Water Permit for Verde Valley Ranch, Clarkdale, Arizona* 3 (Dec. 22, 2000) (emphasis added); *see* R9 Supp. Br. at 7; PD Supp. Br. at 2. The Region and Phelps Dodge also note that the "best practicable control technology currently available" ("BPT") standard set forth in CWA § 301(b)(1)(A) has been superseded for NPDES permits issued after March 31, 1989, by the more stringent "best available technology economically achievable" ("BAT") standard for toxic pollutants (see 40 C.F.R. § 401.15 for list of toxics) and "best conventional control technology" ("BCT") standard for conventional pollutants (see CWA § 304(a)(4) and 44 Fed. Reg. 44,501 (July 30, 1979) for conventional pollutants). CWA § 301(b)(2)(A), (C)-(F), 33 U.S.C. § 1311(b)(2)(A), (C)-(F); *see* R9 Supp. Br. at 2; PD Supp. Br. at 2 (quoting preamble to EPA storm water regulations, 55 Fed. Reg. 47,990, 48,058 (Nov. 16, 1990), which states that "each industrial facility must meet BAT/BCT-level controls in its NPDES permit").

Region IX's conclusion that the permit/SWPPP complied with CWA § 301 technology-related pollutant control requirements, and the predicate judgments and analyses that led it to reach that conclusion, *see generally* SWPPP, suffice to fulfill the mandate of CWA § 402(p)(3)(A), which states: "Permits for [storm water] discharges associated with industrial activity shall meet all applicable provisions of * * * section [301] of this title." *See Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 928-29 (5th Cir. 1998) ("In situations where the EPA has not yet promulgated any [effluent limitation guidelines] for the point source category or subcategory, NPDES permits must incorporate 'such conditions as the Administrator determines are necessary to carry out the provisions of the Act.' 33 U.S.C. § 1342(a)(1). * * * In practice, this means that the EPA must determine on a case-by-case basis what effluent limitations represent the BAT level, using its 'best professional judgment.' 40 C.F.R. § 125.3(c)-(d). Individual judgments thus take the place of uniform national guidelines, but the technology-based standard remains the same."); *Trs. for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984) (same for BCT).

E. *Miscellaneous Issues*

1. *Breach of Trust and Fiduciary Duties*

The Nation contends that EPA has "a special trust and fiduciary duty to fully address adverse impacts to Indian trust resources." Pet'n at 41. The Nation argues that Region IX breached this duty by approving the storm water permit for the proposed project. *Id*. at 29, 41. In response, the Region points out that this issue was not raised during the public comment period on the draft permit and thus cannot be raised for the first time on appeal. R9 Resp. at 5 (citing 40 C.F.R. § 124.19(a)).

As the Region notes, the regulations governing this NPDES permit review process mandate that persons seeking review of a permit must demonstrate that any issues or arguments raised on appeal were previously raised during the public comment period on the draft permit, or were not reasonably ascertainable at that time. 40 C.F.R. §§ 124.13, .19(a); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, NPDES Appeal Nos. 00-14 & 01-09, slip op. at 22-23 (EAB Feb. 20, 2002), 10 E.A.D. ___. On numerous occasions, the Board has explained the rationale behind the requirement that issues be preserved for review, noting, "The effective, efficient and predictable administration of the permitting process[] demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final." *In re Encogen Cogeneration Facility*, PSD Appeal Nos. 98-22 to -24, slip op. at 8 (EAB Mar. 26, 1999), 9 E.A.D. ___, *quoted in Gov't of D.C.*, slip op. at 23, 10 E.A.D. ___; *see In re New England Plating Co.*, NPDES Appeal No. 00-07, slip op. at 10 (EAB Mar. 29, 2001), 9 E.A.D. ___; *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999).

In this case, we reviewed the Nation's comments on the draft permit and found no allegation therein that the federal government's trust and fiduciary responsibilities were being breached in connection with issuance of the storm water permit. *See* Pet'r Ex. B (Nation's comments). Moreover, we found nothing within the Region's Response to Comments indicating that such a comment had been presented to it,

and the Yavapai-Apache Nation neither contends that the issue was raised below nor argues that it was not reasonably ascertainable during the public comment period on the draft NPDES permit. It therefore appears, as the Region contends, that the issue of trust/fiduciary duty was not raised during the comment period. Review of the permit on this ground accordingly must be denied. *See* 40 C.F.R. §§ 124.13, .19(a).

2. *Environmental Justice*

The Yavapai-Apache Nation argues that Region IX failed to analyze the allegedly disproportionately high and adverse human health and environmental effects that the proposed project will have upon the Nation, a minority and low-income population, and thus violated environmental justice policies. Pet'n at 41. In making this argument, the Nation repeats the very general comments it made on the draft permit; it does not identify clear errors of fact or law in the Region's response to those comments or handling of the permit. *See* Pet'r Ex. B at 16 (Nation's comments); RTC ¶ 18, at 23 (Region's response to Nation's environmental justice comments). For instance, the Region states in the RTC that it believes "the design of the project will ensure that there will be no excessive human health or environmental impacts to minority or low income communities." RTC ¶ 18.2, at 23. On appeal, the Nation offers no specific information as to how the Verde Valley Ranch will affect tribal health or environment in a disproportionate way. Due to a lack of sufficient specificity in its environmental justice arguments, review of the permit on this ground is denied. *See In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 99-8 to -72, slip op. at 7 (EAB Mar. 14, 2000), 9 E.A.D. ___ ("Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review. * * * For purposes of specificity, the Board expects such petitions to clearly identify the issue being raised and to provide some supportable reason as to why review is warranted.").

F. *EPA's Policy Choice*

As mentioned in the Part II introduction above, the Yavapai-Apache Nation argued with particular force at oral argument that EPA made a significant policy choice when it decided to allow remediation of the tailings pile and contaminated alluvial aquifer to proceed in accordance with the CWA rather than CERCLA. *See* Tr. at 7-8, 16-21; *see also* Pet'n at 9, 11; Reply Br. at 5 n.6. According to the Nation:

> [I]nstead of remediating under the [Superfund,] which would have clearly required an environmental impact statement under NEPA, and with it the cultural evaluations, the impact on the river, its subflow, its base flow, its water quality and ground water, instead of doing that and looking at the impacts on the tribe immediately upstream and downstream from this site, they redescribed it as a subdivision. And therefore, by piecemealing the small permits together, were able to take a myopic, very narrow view of a few environmental concerns, mainly the only thing that was evaluated was the impact of the NPDES permit on the project. In other words, there was never a comprehensive look.

Tr. at 7-8. Citing the spirit of NEPA and EPA's obligation to protect the public interest, the Nation urged the Board to find that EPA Region IX abused its discretion by not requiring a comprehensive EIS for the proposed Verde Valley Ranch project. Tr. at 13, 16.

Under questioning at oral argument, EPA Region IX conceded that what it characterized as the "extensive" environmental analyses done for the Verde Valley Ranch did not in actuality approximate the depth of analysis that might have been required had the remediation of the site proceeded pursuant to CERCLA.[49] Tr. at 50-51, 52. That being said, the

[49]We are not able to determine, on the basis of the record before us, whether a "Remedial Investigation/Feasibility Study," or "RI/FS," (*see* Tr. at 51) would have been (continued...)

Region nonetheless contended that EPA properly exercised its discretion to remediate this site under the CWA. Tr. at 49 ("[t]his site was amenable to remediation under different environmental statutes"). The Region maintained that "this is a protective permit and * * * an appropriate resolution of this environmental problem" presented by this site. Tr. at 53. Phelps Dodge, for its part, noted that "there's a broad range of discretion that EPA has to address a site that's so preliminary on the [CERCLA investigation] list." Tr. at 81-82; *see also* RTC ¶ 16.3, at 22 ("[a]fter review of the results of the site investigations, * * * EPA's Superfund program concluded that suitable tools were available under the [CWA] to ensure appropriate remediation of the site"); Pet'r Ex. D (Letter from Alexis Strauss, Water Division, EPA Region IX, to Joe P. Sparks 1 (May 28, 1997)) ("[w]ith the project falling under several EPA mandates, it was concluded that the best approach would be to handle all activities under the authority of the [CWA]").

In light of the impacts the Verde Valley Ranch development will inexorably have on the unique, fragile, biologically and culturally valuable environment for which it is proposed, we can well appreciate the Nation's policy argument. However, we are legally constrained to grant review sparingly, in only those cases where clear error or other

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[49](...continued)
required to be prepared for the tailings site, or whether EPA would have chosen alternate means under CERCLA to analyze and remediate the contaminated area. In any event, it is not a foregone conclusion that an EIS would have been required under CERCLA. The Agency generally takes the position that the RI/FS process is functionally equivalent to the NEPA EIS process, provided adequate public participation is incorporated into the RI/FS process. *See*, *e.g.*, EPA Office of General Counsel, *Public Participation in Remedial Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 1982 WL 171292 (Sept. 1, 1982); EPA Office of General Counsel, *Applicability of Section 102(2)(C) of the National Environmental Policy Act of 1969 to Response Actions Under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 1982 WL 45416 (Sept. 1, 1982); *see also* Howard Geneslaw, *Cleanup of National Priorities List Sites, Functional Equivalence and the NEPA Environmental Impact Statement*, 10 J. Land Use & Envtl. L. 127 (Fall 1994); Sandra P. Montrose, Comment, *To Police the Police: Functional Equivalence to the EIS Requirement and EPA Remedial Actions Under Superfund*, 33 Cath. U. L. Rev. 863 (Summer 1994).

substantial reason to grant review is present. *See* 40 C.F.R. § 124.19(a); 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). Here, EPA truly had discretion to choose to proceed under one statute or the other; the Nation has cited no authority to us to establish that the Agency was required to proceed under CERCLA rather than the CWA, and we are not aware of any such requirement. Thus, the path charted by the Region was legitimate and legally authorized. Here also, EPA, the Corps, FWS, the SHPO, and other governmental entities conducted a variety of detailed analyses of the proposed project's environmental impacts and, for the reasons expressed in the foregoing sections, we found no clear error in EPA's preparation of or reliance on those analyses. Based on these considerations, we decline to exercise our discretion to grant review of the NPDES permit on this ground.

G. *Reinitiation of ESA Section 7 Consultation*

While we deny review of the Verde Valley Ranch NPDES permit on the bases raised in the petition, we nonetheless find it necessary, as noted at the outset of this opinion, to remand the permit to Region IX for further proceedings consistent with the ESA and its implementing regulations.

As mentioned in Part I.C above, the Yavapai-Apache Nation sent a letter to Region IX on January 3, 2002, requesting that the Agency reinitiate formal consultation with FWS under ESA section 7 regarding potential impacts of the federal action on critical habitat for the spikedace, a threatened fish species. *See* Yavapai-Apache Nation's Notice of Filing Supplemental Authorities Ex. A (Jan. 17, 2002). FWS proposed this habitat designation on December 10, 1999, and issued it in final form on April 25, 2000, almost a year prior to Region IX's issuance of this NPDES permit decision. *See* 64 Fed. Reg. 69,324 (Dec. 10, 1999); 65 Fed. Reg. 24,328 (Apr. 25, 2000), *appeal docketed*, *N.M. Cattle Growers Ass'n v. FWS*, Civ. No. 02-199 (D.N.M. Feb. 20, 2002). Both the proposed and final designations of spikedace critical habitat occurred after ESA consultation on the NPDES permit had concluded and after the public comment period on the proposed NPDES permit had closed, but before the Nation filed its petition for review of the permit.

The Region and Phelps Dodge argue that, because this issue could have been raised in the Nation's petition, it should be denied for lack of timeliness. R9 Status Rep. at 4-5 (quoting *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 121, 126 n.9 (EAB 1999)) ("[n]ew issues raised [by petitioner] for the first time at the reply stage of these proceedings are equivalent to late-filed appeals and must be denied on the basis of timeliness"); PD Status Rep. at 1-2.

While it is true that this issue was reasonably ascertainable at the time the Nation filed its petition and thus could have been included therein, we decline to use the lack of timeliness rationale to dispose of the issue at this juncture. Under the ESA and its implementing regulations, the action and resource agencies (here, EPA Region IX and FWS, respectively) had an affirmative obligation to reinitiate section 7 consultation in these circumstances. The ESA regulations provide:

> Reinitiation of formal consultation is required and shall be requested by the [f]ederal agency or by the [FWS], where discretionary [f]ederal involvement or control over the action has been retained or is authorized by law and:
> * * * *
> (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16(d).

In this case, Region IX had not yet issued the NPDES permit decision when FWS designated the spikedace's critical habitat, and indeed the permit has to date still not yet become effective due to the pendency of this appeal. *See* 40 C.F.R. § 124.15(b)(2). As a consequence, Region IX retained and indeed still retains discretionary involvement or control over the NPDES permit in that it still possesses the ability to "'implement measures that inure to the benefit of the protected species'" and habitat. *See Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1080 (9th Cir. 2001) (quoting *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995)); *see also Pac. Rivers*

Council v. Thomas, 30 F.3d 1050, 1053-57 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995); *Croman Corp. v. United States*, 51 Fed. Cl. 654, 655-58 (2002); *Waterwatch v. U.S. Army Corps of Eng'rs*, No. CIV-99-861-BR, 2000 WL 1100059, at *5-11 (D. Or. June 7, 2000). Moreover, EPA Region IX reports that the Verde Valley Ranch NPDES permit "may affect" the critical habitat of the spikedace. R9 Status Rep. at 7. Thus, all the prerequisites for reinitiation of consultation are in place. *See* 40 C.F.R. § 402.16(d).

The ESA also provides that:

> After initiation of consultation under subsection [7](a)(2) of this section, the [f]ederal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action [that] has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures * * *.

ESA § 7(d), 16 U.S.C. § 1536(d). This prohibition on the commitment of resources applies after consultation is initiated *or* reinitiated in accordance with 50 C.F.R. § 402.16, *see* 50 C.F.R. § 402.09, and lasts until section 7 consultation is concluded. *Id*.; *see Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992) ("[i]n order to maintain the status quo, section 7(d) forbids 'irreversible or irretrievable commitment of resources' during the consultation period"); *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) ("If a project is allowed to proceed without substantial compliance with [the ESA's] procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible.") (citing *TVA v. Hill*, 437 U.S. 153 (1978)). Thus, the permit cannot be reissued or become effective until the reinitiated section 7 consultation process is completed and any necessary changes integrated into the permit in accordance with the NPDES permitting process.

The Region now explains that in light of its finding that the NPDES permit may affect spikedace critical habitat, it reinitiated

"informal"[50] consultation with FWS in February 2002. R9 Status Rep. at 7. The Region notes that it requested an up-to-date species list for the NPDES permit's action area "to determine whether any newly listed or proposed species or newly designated or proposed critical habitat, other than the spikedace critical habitat, should also be considered in this [reinitiated] consultation." *Id*. FWS submitted a list indicating that in June 2000, FWS proposed the chiricahua leopard frog for listing as threatened, *see* 65 Fed. Reg. 37,343 (June 14, 2000), and that in April 2000, FWS designated critical habitat for the loach minnow concurrently with the designation of critical habitat for the spikedace. *See* 65 Fed. Reg. 24,237 (Apr. 25, 2000). Region IX reports that it intends to work with FWS and Phelps Dodge "to move forward with the reinitiated consultation as quickly as possible." R9 Status Rep. at 8.

The Region suggests that the Board should simply wait at this point prior to issuing a decision until the Agency completes section 7 consultation with FWS. *Id*. at 12. In light of the uncertainties involved in such a proposition, including the possibility that the NPDES permit may be revised and public comment solicited on the revisions, we are not inclined to further delay our ruling on the Yavapai-Apache Nation's long-pending petition for review. Therefore, while we deny review of the permit on all the bases raised in the petition, we remand the permit to Region IX for further proceedings consistent with the ESA and its implementing regulations. Our remand on this basis is justified, despite the issue's lack of timeliness in this appeal, because, as the Yavapai-Apache Nation correctly contends, "The duty of consultation is an affirmative obligation under [f]ederal law, and it is not the obligation of local citizens or the Nation to point out this statutory mandate to the EPA. Rather, it is the EPA that is charged under the [ESA] to be ever vigilant for new regulations and the designation of critical habitat that may trigger that agency's duty to reinitiate consultation." Pet'r Status Rep. at 12; *see also In re Pub. Serv. Co. of N.H.*, 1 E.A.D. 332, 344 (Adm'r 1977) (EPA is "the representative of the public interest and is not

[50] *See* R9 Status Rep. at 9 ("Region IX does not know at present whether the reinitiated consultation in this case will require use of the formal consultation process or whether the process may be concluded through informal consultation.").

'an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection' at the hands of the Agency") (quoting *Scenic Hudson Pres. Conference v. Fed'l Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966)). This is particularly true in cases where, as here, a great deal of time elapses between initial ESA consultation and final permit issuance.

III. *CONCLUSION*

For the foregoing reasons, we deny review of all the elements of the Yavapai-Apache Nation's petition. However, as discussed in the preceding section, we remand the permit to EPA Region IX for further proceedings in accordance with the ESA and its implementing regulations. Region IX is directed to reopen the NPDES permit proceedings for the limited purposes identified in Part II.G (Reinitiation of Section 7 Consultation) of this decision. Any person who participates in the remand process and is not satisfied with the Region's decision on remand may file an appeal with the Board pursuant to 40 C.F.R. § 124.19. Any such appeal shall be limited to issues within the scope of the remand. Review of all other issues is denied.

So ordered.